

THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976:
ITS ORIGIN, MEANING AND EFFECT*

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I. INTRODUCTION

Following replacement of Dr. Francois "Papa Doc" Duvalier by his son, Jean-Claude "Little Doc" Duvalier, as President of the Republic of Haiti in 1971, the previously strained relations between Haiti and the United States eased somewhat. Although the United States did not wish to resume direct arms sales to Haiti, it did encourage private armament sales by American firms. Thereafter, Aerotrade, Inc., a Florida corporation, entered into a procurement contract with Haiti agreeing to sell it an assortment of military equipment. Later a dispute arose between the parties over the contract's terms. After negotiations failed, Aerotrade filed suit in the United States District Court for the Southern District of New York to enforce its contract rights by attaching funds of the Banque Nationale de la Republique d'Haiti, as alter ego of the Republic of Haiti, on deposit with First National City Bank. Aerotrade claimed damages for lost profits on orders that Haiti failed to place and \$867,000 for goods sold and delivered to Haiti for which payment was never received.

The government of the Republic of Haiti may have believed that it acted properly in its dealings with Aerotrade. Like all defendants, however, it believed its chances of success in the litigation would be enhanced if the merits were never reached. In order to avoid the merits, Haiti retained Professor Andreas F. Lowenfeld of New York University School of Law to obtain a dismissal of the suit.¹

Professor Lowenfeld first instructed Haiti's Ambassador to the United States to send a note to the Secretary of State requesting him to recognize and allow Haiti's claim of sovereign immunity.² While a decision on the note was pending, however, Professor Lowenfeld discovered that high-ranking State Department officials had given testimony before a subcommittee of the House Judiciary Committee indicating that the note would not be acted upon favorably. He thereupon instructed the Haitian Ambassador to withdraw his note and made the claim of immunity directly to the court. The court, following authority in the Second Circuit, held that Haiti was immune from suit because the transaction sued upon

Editor's Note: Due to the length of the article, footnotes will be found at the end of the text.

was one "concerning the armed forces" and dismissed the suit.³

Aerotrade's attempt to assert a cause of action against the Republic of Haiti illustrates some of the inadequacies of the doctrine of foreign state immunity as it has been applied in the United States. First, individual determinations of claims to immunity have been somewhat unpredictable. Second, the extent of immunity recognized in the United States has been broader than either international law or sound policy requires. Third, marginal differences in diplomatic and judicial policy have encouraged forum-shopping that embarrasses the nation and makes individual outcomes even less predictable. In addition to these inadequacies, the manner in which foreign state immunity claims have been decided has been injurious to American foreign relations.

Most of the inadequacies of the doctrine of foreign state immunity as it has been applied in the United States have been direct results of the State Department's role in the process. Unpredictability of decisions has been caused by the Department's failure to promulgate a description of the standards it applies that is more detailed than the single sentence contained in its initial pronouncement on the subject--the Tate letter;^{3a} its institutional inferiority in applying those standards to factual situations; and by the courts' deference to State Department policy and decisions. Unnecessary generosity in granting immunity has resulted from the Department's institutional bias in favor of preserving friendly relations with the parties who can help it to achieve its institutional goals. Competing standards of decision have been the product of the foreign state defendant's ability to invoke State Department action to overrule judicial precedent in the matter at hand. And injury to American foreign relations has been caused by the Department's willingness to use immunity as a means of placating foreign states showing hostile designs, feigned or otherwise, in some unrelated area of our relations with them.

Congress has recently acted to remedy most of these inadequacies by enacting the Foreign Sovereign Immunities Act of 1976.⁴ This statute empowers the federal and state courts to decide claims to foreign state immunity from their process, codifies the conditions upon which immunity shall be granted, and withdraws the State Department's authority both to prescribe and to apply rival standards of immunity. In doing so, the Foreign Sovereign Immunities Act of 1976 will greatly improve the manner in which the international law doctrine of the foreign state immunity is implemented in the United States.

Enactment of the Foreign Sovereign Immunities Act of 1976 is not the only recent development of note with regard to

the immunity of foreign states from judicial process in the United States. On May 24, 1976, the Supreme Court decided Alfred Dunhill of London, Inc. v. The Republic of Cuba,^{4a} an "act of state"^{4b} case. Although that case was technically decided on grounds that no "act of state" had taken place, four justices expressed the opinion that the "act of state doctrine" should be applied only to those actions in which sovereign immunity would be required under the "restrictive theory" adopted by the United States, and Justice Stevens reserved decision on this issue. Thus, while in the past a private plaintiff attempting to take a foreign sovereign to court in the United States had two hurdles to pass--the "act of state doctrine" and the "sovereign immunity doctrine"--in the near future sovereign immunity law may be the sole obstacle.^{4c}

In this context, this article will examine the Foreign Sovereign Immunities Act of 1976, the case law and State Department precedent which it supplants or codifies, and the international law standards which establish the minimum degree of immunity permitted.⁵ The article has three objectives in doing so: it will seek to add definition to the Foreign Sovereign Immunities Act of 1976 by outlining judicial and diplomatic precedent in areas in which the legislation leaves existing State Department policy untouched; it will try to reveal the codification's consistency with the minimum requirements of international law and the extent to which it grants immunity without compulsion from international law standards; and it will attempt an analysis of the legislation's achievements by comparing it to prior law and to alternatives which were within Congress' power.

II. THE CONSTITUTIVE PROCESS

A. The World Constitutive Process

In the international arena, governments, corporations and other organizations have always acted to maximize things they value--be it the well-being of their subjects or the wealth of their shareholders--by manipulation of the resources at their command. As interactions between these participants in the international order increased and pursuit of their individual goals brought them more and more into conflict, the world community developed a process by which rationalizations of these pursuits could be made by the whole in the interests of the whole. This process, which has been called the "world

constitutive process of authoritative decision,¹⁶ creates and enforces standards that control the behavior of these participants in transactions with substantial international consequences. It channels the demands of the participants into certain arenas, favors certain forms of exerting the demands over others, and establishes and enforces accepted substantive rules of behavior, called international law. The world does so in the interests of stability in expectation, believing that all participants in the world arena have a better chance of satisfying their demands on the world's resources if their interactions are brought under some common control in a predictable way.

To determine whether the world community has, in fact, created international law with respect to a particular transaction, it is necessary to discover whether the effective elites of the world community--leaders of governments, corporations and other associations--have a common expectation that the community as a whole has prescribed certain conduct and will enforce its prescription with sanctions.⁷ Sometimes these expectations of effective authority are created by multilateral conventions and treaties. Other times they are created by an extended practice of uniform behavior among the participants, called "customary international law." Jurists, statesmen, and other officials, in searching for customary international law, usually make reference to "certain past uniformities in behavior [of the participants], such uniformities allegedly offering good evidence of community expectation because of their having occurred in accordance with perspectives of the participants that such behavior was required."⁸ But the proper inquiry must always be whether the participants presently have shared expectations that they are required by the community to act in certain ways.

It is commonly accepted that customary international law limits the power of one state to subject a foreign state to judicial process in its domestic courts. The precise international requirement will be described more fully in the next section. In brief, it protects foreign states from suits based on their "public," noncommercial acts, and their public use property from execution to satisfy a judgment, without the sovereign's consent. This standard is the outcome of an attempt to stabilize the interaction of pressures exerted by each of the relevant participants, primarily by diplomatic and economic means, in the courts, foreign offices and marketplace, in an attempt by each to maximize the things it values.

The world participants with special interests in sovereign immunity include governments and corporations with varying interests. State trading nations desire immunity from judicial process in order to maximize their wealth for the

benefit of their subjects by gaining an advantage over their privately organized competitors.⁹ Capital importing nations with thoughts of either nationalizing foreign investments or of attracting investments made by other governments also desire immunity, especially from execution in the latter case, in order to promote the well-being of their subjects.¹⁰ Capital exporting nations, on the other hand, desire that governments of recipient nations be subject to judicial compulsion in municipal courts in order to prevent confiscation of their subjects' investments. Private international trading corporations and international investors, especially those in the extractive industries, also desire that governments be accountable in municipal courts. The trading corporations wish to be able to compete with state traders and to enforce contracts with foreign sovereigns in order to maximize the wealth of their shareholders. The investors wish to be able to protect their investments from confiscation and to enforce the debts of government borrowers for the same purpose. However, domestic corporations who may be the beneficiaries of investments by foreign sovereigns favor immunity from execution to encourage foreign government investments and reduce their firm's cost of capital.

The participants exert their demands for or against an international standard requiring sovereign immunity primarily in two arenas: the marketplace and the domestic governmental institution--foreign office or court--charged with determining claims to sovereign immunity. Because the private participants' power base is their control of wealth, international trading and investment corporations exert their demands primarily in the marketplace. The trading corporations contracting with foreign governments and governmental instrumentalities can extract waivers of immunity in return for adjustments in the price of goods traded.¹¹ The investors can negotiate waivers of immunity in the debt instruments or concession agreements issued by foreign governments.¹² Foreign government investors also exert pressures in this arena by threatening to withhold capital from foreign capital markets without assurance of immunity from execution. The strategies employed in this arena are basically economic, but by alerting governments to the interests of their subjects in the immunity question, the participants can make these economic strategies the basis of political demands made by their governments before courts and foreign offices.

The more common arena in which the participants exert their influence to affect international sovereign immunity law is the government institution--foreign office or courts--to which the national constitutive process gives authority to de-

cide claims to immunity.¹³ If the courts are given such authority, private litigants, foreign sovereigns and the forum government attempt to influence the decision by making known to the court what international repercussions are likely to result from a rule establishing or denying immunity. If the foreign office makes the authoritative decision, foreign sovereigns exert economic and political pressures on it through diplomatic channels, while the private participants employ domestic political networks, including other governmental offices concerned with economic matters, to influence its decision.

B. The National Constitutive Process

Within the structure of each national government some institution must be given authority to control the nation's participation in the world constitutive process. In the area of foreign state immunity, this participation involves two basic functions. First, the nation must decide how to exert its influence in the prescription of international law by choosing standards for determination of sovereign immunity claims in its national courts. At the same time, it must decide whether, as a matter of national policy, some circumstances require that immunity be granted though not required by international law. Second, the nation must apply the international law outcome of the prescriptive process, or higher national standards, to individual cases before its courts. The relevant questions for the national constitutive process, then, are: What domestic institution should formally prescribe the standards by which claims to immunity from suit in domestic courts are determined? What domestic institution should apply these standards of decision to the facts of an individual case?

The answers provided by the American law of foreign state immunity before the Foreign Sovereign Immunities Act of 1976 were confused. According to judicial theory, the State Department was supposed to prescribe the national standards against which claims were judged, but in practice each Circuit had a body of law which differed in detail from the State Department's prescriptions and which might be applied in the absence of a definitive State Department determination.¹⁴ The sovereign chose the forum--State Department or courts--in which to make its claim, and its choice determined which standards were applied.

The Foreign Sovereign Immunities Act of 1976 makes basic changes in this constitutive structure. It replaces State Department and judicial standards with a Congressional prescription of the standards by which sovereign immunity

claims before American courts are to be decided. And under the codification the courts alone will apply that standard to individual claims to immunity.¹⁵

1. Prescription of National Standards

The historic source of American sovereign immunity law is The Schooner Exchange v. M'Fadden.¹⁶ During the Napoleonic Wars, the "Balaou," a French vessel of war, was damaged by storm in the North Atlantic and entered the port of Philadelphia to make repairs. While there, American citizens libeled the vessel in the federal district court, claiming it was the "Exchange," a commercial schooner owned by them, and that it was seized by Napoleon in violation of international law and outfitted as a vessel of war. The United States Attorney, on orders from the Executive Department, appeared before the court and filed a suggestion that the vessel was immune from suit. The district court approved the suggestion and dissolved the attachment. On appeal from a reversal of that decision by the Circuit Court, the Supreme Court held the ship immune from suit and ordered the attachment dissolved.

Chief Justice Marshall, writing for a unanimous Court, began with the proposition that the jurisdiction of the courts, as part of the national sovereignty, is unlimited within the national territory unless the American sovereign consents to immunity. He found, however, that in order to promote the inclusive goal of improving world intercourse, all sovereigns had by custom consented to a partial relaxation of jurisdiction. Marshall found that the immunity of public warships from the jurisdiction of the courts was one which the American sovereign must be presumed to have granted.

[A] public armed ship . . . constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign,

within whose territory she claims the rites of hospitality.¹⁷

Marshall never portrayed this immunity as absolute or incapable of repeal, however. He expressly stated that the American sovereign (apparently meaning the executive and legislative branches) could legitimately revoke the immunity it otherwise would be presumed to have granted by announcing its intention to do so.¹⁸ The Schooner Exchange, therefore, not only established the doctrine of sovereign immunity in American case law; it also recognized that the executive and legislative branches of government are the proper institutions to determine when immunity should be granted.

The plenary power of the political branches to prescribe national standards against which claims to immunity would be judged did not become firmly settled until the 1940's, though. In that decade the Supreme Court's decisions in Ex parte Republic of Peru¹⁹ and Republic of Mexico v. Hoffman²⁰ established that the courts were bound by State Department decisions, or in their absence by State Department guidelines, in responding to claims of immunity.

Ex parte Peru came to the Supreme Court directly from the district court, which had refused to dismiss a libel filed by a Cuban corporation against the *Ucayali*, a state-owned Peruvian vessel, alleging breach of a charter party. The United States Attorney had filed a suggestion with the court stating that the State Department "recognizes and allows the claim of immunity" made by the Peruvian Ambassador. The district court, however, determined that Peru had already waived its immunity from suit by requesting an extension of time and by taking the deposition of the ship's master. On petition for a writ of prohibition, the Supreme Court held that Peru's actions did not constitute a waiver and, after extensive remarks on the need for the judiciary to follow the executive's lead in questions of this nature,²¹ that the State Department's recognition and allowance of the claim must be given binding effect.

The Department has allowed the claim of immunity and caused its action to be certified to the district court through the appropriate channels. The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations.

Upon the submission of this certification to the district court, it became the court's duty, in conformity to established principles, to release the vessel and to proceed no further in the cause.²²

Because the courts have never questioned the State Department's reasons for granting immunity,²³ Ex parte Peru in effect established that the State Department in its discretion could prescribe the conditions under which immunity is granted by informing the courts of its determination in individual cases.

Republic of Mexico v. Hoffman, decided two years later, held that courts must apply State Department prescriptions in resolving claims to immunity even in the absence of State Department action on a particular claim. The case arose out of the libel in the Southern District of California of a Mexican tug, the "Baja California," by the owner of a fishing vessel whose boat allegedly had been struck by the tug's tow. The Republic of Mexico owned the tug, but had leased it to a private corporation, which possessed it when the accident and arrest occurred. The Mexican Ambassador presented a suggestion of immunity to the court and requested the State Department to recognize and allow the tug's immunity from arrest. However, at the State Department's request, the United States Attorney for the district only relayed the Mexican claim to the court without taking a clear position with respect to whether the claim should be upheld.²⁴ The district court denied the claim; the Court of Appeals affirmed. On review the Supreme Court upheld the lower court's denial of immunity. Although the Court noted that the majority of circuit courts had denied immunity to a vessel not in the possession and service of the foreign government itself, it rested its decision on other grounds.

More important, and we think controlling in the present circumstances, is the fact that, despite numerous opportunities like the present to recognize immunity from suit of a vessel owned and not possessed by a foreign government, this government has failed to do so. We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which

the government, although often asked,
has not seen fit to recognize.²⁵

Republic of Mexico, then, established that even in the absence of a specific State Department determination, the courts would apply general State Department policy in ruling on claims to foreign state immunity.

The Supreme Court's abdication of the national prescriptive function in favor of the State Department remained in effect for the most part, but it was never complete.

First, the Supreme Court itself did not feel bound by its decision in Republic of Mexico. In the only case since decided by the Supreme Court on the issue of foreign sovereign immunity, the Court granted immunity where there was no State Department authority for doing so. The issue in National City Bank v. Republic of China²⁶ was whether a foreign sovereign plaintiff could be immune from a counterclaim and setoff in which the defendant alleged default on obligations of the foreign government. Without explicitly retracting from the decision in Republic of Mexico, the majority opinion observed that "[t]he freedom of a foreign sovereign from being hauled into court as a defendant has . . . become part of the fabric of our law . . . solely through adjudications of this Court."²⁷ While the Court noted that the subject matter of the counterclaim was one for which the State Department had recognized immunity in a recently published letter, and could point to no expression of State Department policy limiting that immunity in the case of a sovereign plaintiff, the Court concluded that "the consideration of fair dealing" required a holding that a foreign sovereign plaintiff waives its immunity to a counterclaim to the extent of the recovery on its cause of action.²⁸ Mr. Justice Reed, joined by Justices Burton and Clark, in dissent pointed out that the court was usurping the prescriptive function it had assigned to the State Department a decade before.²⁹

Second, in making prescriptive interpretations of general State Department standards, not all lower courts have been diligent in attempting to discover and follow the latest State Department interpretations. The State Department did not publish interpretive changes in its general sovereign immunity standards. They appeared only when the State Department responded to requests for immunity in individual cases made to it directly. When the State Department was by-passed by a sovereign and the claim to immunity was made directly to the court, the decision often turned on an outdated circuit court interpretation of the State Department's general policy.³⁰

The result of the Supreme Court's inconsistency and the lower courts' lack of initiative is that there has existed really two bodies of law--current State Department policy and judicial precedent--which could be applied to a claim to sovereign immunity.³¹ The defendant foreign sovereign chose which body of law would apply by choosing the forum in which to make its claim.

The Foreign Sovereign Immunities Act of 1976 exercises Congress' power to remove the prescribing function from the executive and judicial branches and substitutes a permanent statutory prescription of standards.³² The judiciary, undoubtedly with the aid of amicus briefs from the executive branch, will still make some prescriptive interpretations of the legislation. In addition, the President may still be free to exercise his inherent foreign policy powers in extraordinary circumstances to prevent judicial antagonism of foreign states.^{32a} But any major change in policy now requires Congressional action to amend the United States Code.

2. Application of National Standards

Since the Supreme Court's decision in Compania Espanola de Navegacion Maritima, S.A. v. The Navemar,³³ it was well-established that a foreign state defendant could assert its claim of immunity from proceedings in American courts in either of two ways: (1) the state's representative could file a suggestion of immunity and motion for dismissal in court, or (2) the state's ambassador could request that the State Department relay to the court its recognition and allowance of the state's immunity.³⁴ Until Ex parte Republic of Peru³⁵ and Republic of Mexico v. Hoffman,³⁶ these were simply alternative means of presenting the claim for the court's consideration. After those decisions, the foreign state defendant could determine which branch of the government--the State Department or the court--would make the determinative application of law to its claim. While the plaintiff could forum-shop among federal circuits or state jurisdictions with favorable case law interpretations of sovereign immunity law, the foreign state defendant could forum-shop between the State Department and the courts.

The procedure by which a foreign state presented its claim of immunity to the State Department had been routinized in the last decade. The state's ambassador³⁷ would address a note to the Secretary of State or State Department, setting forth the name of the case and the extent of immunity requested. Usually the note was accompanied by a memorandum of facts and supporting argument. The State Department then notified the plaintiff of the request and sent him a copy of the

foreign state's memorandum. The plaintiff was permitted to make a written presentation of his own. On the request of either party, an informal public hearing was held, usually lasting no more than two hours, before a panel composed of the Legal Adviser or Deputy Legal Adviser and two Assistant Legal Advisers. At the hearing, only oral presentations by the parties' representatives were permitted; no witness testimony was allowed. Some time after the hearing, the Legal Adviser made a decision and sent it to the parties. If the decision was to recognize and allow the claim to immunity, the substance of the decision was relayed to the Attorney General with a request that he order the United States Attorney for the district in which the action was filed to submit a suggestion of immunity to the court.³⁸ There was no appeal from the decision of the Legal Adviser.³⁹ Often no statement of reasons accompanied the decision.

When the State Department decided to recognize and allow the claim to immunity and that decision was communicated to the court, the Department had made the final application of its standards of decision to the circumstances of the case. Upon receiving notification of the State Department's decision from the United States Attorney, the court automatically dismissed the suit. The State Department's decision to grant immunity was binding,⁴⁰ although (1) the foreign sovereign had earlier waived its immunity,⁴¹ (2) the State Department might have been mistaken in its factual conclusions⁴² or might have based them on untrustworthy evidence,⁴³ or (3) the court after applying State Department standards would have decided differently.⁴⁴

The effect of a State Department determination that immunity should not be granted was often less clear, although the reasoning of Republic of Mexico v. Hoffman⁴⁵ seems to require that a negative determination be equally binding on the courts. Several lower courts so held.⁴⁶ Others, however, stated that the State Department's refusal to grant immunity is entitled only to great weight,⁴⁷ sometimes requiring further evidence on the part of the plaintiff to survive the foreign state's motion to dismiss.⁴⁸ One court went so far as to disagree with the Department's application.⁴⁹

The State Department at times took only partial action or refused to make any decision at all. For example, it has relayed requests for immunity to the courts without decision, except to consider as true the factual allegations of a petitioning Ambassador.⁵⁰ In such cases, the factual allegations have usually been taken to be irrefutably established.⁵¹ More often the Department has relayed the request without comment⁵² or informed the parties that it would take no action on the re-

quest.⁵³ Though in some cases the courts found "significant" the State Department's failure to act⁵⁴ or felt assured that denial of immunity would not prejudice U.S. foreign relations,⁵⁵ non-action by the Department usually has had no effect other than to require the court to make an independent determination of the claim to immunity.⁵⁶

Even under former law, in the absence of a definitive State Department determination, the court decided whether the foreign state was entitled to immunity.⁵⁷ If the State Department had not forwarded the foreign state's diplomatic claim,⁵⁸ or if the state chose not to make a presentation to the State Department, the issue was raised before the court by a special appearance of the foreign state or "its accredited and recognized representative."⁵⁹ Before granting dismissal, the court had to be satisfied that sovereign immunity was warranted. The sovereign had the burden of proving the requisite facts.⁶⁰ If the issue could not be disposed of on pleadings, a fact-finding hearing was conducted.⁶¹ Once the facts were established, the court applied the State Department's prescriptions and ruled on the claim.

The Foreign Sovereign Immunities Act of 1976 eliminates the choice of forums in which to assert claims to immunity. The declaration of Congressional purpose indicates that one of the objectives of the legislation is to vest in the courts exclusively the power to decide claims of immunity.⁶² Indeed, this change was a part of the State Department's motive for proposing the legislation.⁶³ Presumably, then, under the new legislation the State Department will no longer make suggestions of immunity to the courts, or, if it does, the courts will ignore them under usual circumstances. Thus, the new legislation effectively makes the judiciary the sole forum for making sovereign immunity determinations.

The Foreign Sovereign Immunities Act of 1976 does not expressly allocate the burden of proving a claim of immunity or state which parties have the capacity to bring such a claim to the court's attention. Resolution of these issues will depend on whether the action at hand arises in the federal court on some basis of jurisdiction (such as federal question jurisdiction^{63a}) other than the foreign public character of the defendant or in the state courts. If the action does so arise, the courts may apply pre-codification case law to require that the claim to immunity be presented by a proper representative of the sovereign, and may assign to the sovereign the burden of proving facts supporting its claim, but their authority to do either is unclear. The legislation is structured to provide for immunity in all cases unless the case fits within a specific exception to immunity.⁶⁴ Indeed, State Department

comments accompanying an earlier draft of the legislation stated that the legislation carries with it an "assumption" of immunity,⁶⁵ implying that private plaintiffs would have the burden of proving that no immunity is warranted. Yet the House Report accompanying the legislation as enacted states that sovereign immunity will remain an affirmative defense, which must be proven by the sovereign asserting it.⁶⁵⁻¹ Without express provision to the contrary, the legislation permits the courts to allocate the burden of proof, as they have in the past, to the foreign state defendant, as the moving party and on the theory that it has better access to relevant evidence. On the other hand, if the action at hand is in federal court and its sole jurisdictional basis is the foreign public character of the defendant,^{65a} the plaintiff must plead and prove an absence of immunity^{65b} and the court may find immunity and dismiss on its own motion,^{65c} since the existence of immunity will be a jurisdictional question.

III. THE LAW OF FOREIGN STATE IMMUNITY

As of January 19, 1977, the Foreign Sovereign Immunities Act of 1976^{65d} will control the resolution of claims to foreign state immunity made in federal or state courts. In determining claims to immunity presented by foreign states, the courts will look closely to the terms of the new legislation. It seems likely that they will also look to prior State Department and judicial precedent for aid in interpreting the new legislation, since much of the act merely codifies existing policy. However, the statute departs from prior law in leaving no role for international law in the process by which claims to foreign state immunity are decided in the United States.

Under prior law, while State Department policy and judicial precedent were the positive law controlling resolution of claims to foreign state immunity, international law constantly limited and influenced the standards of decision applied. The State Department, in establishing its own policy with respect to the immunity of foreign states, was careful to assure the minimum immunity prescribed by international law.⁶⁶ The courts were required to observe the minimum international standard, because customary international law is part of the body of law that both federal and state courts must apply.⁶⁷ The importance of international law in the decision-making process was obscured, however, because the standards prescribed by the State Department and accepted by the

courts went well beyond the minimum immunities required by international law.

The Foreign Sovereign Immunities Act of 1976 appears to leave no room for the impact of international law on the standards of decision by which claims to foreign state immunity within the United States are to be decided. Immunity is to be extended except from those actions enumerated in the act, even though international law at some future date should no longer require that immunity be extended, unless a future treaty or other act of Congress limits the new legislation's scope. Immunity is to be denied from those actions enumerated in the act, though international law requires that it be extended, unless some existing international agreement to which the United States is now a party provides otherwise.^{67a} Although an earlier State Department draft of the new act declared that the courts should abide by principles of international law codified by the act "and other principles of international law,"⁶⁸ the legislation as enacted requires that claims be decided in conformity with the act alone.⁶⁹

This section surveys three bodies of law that are relevant to the immunity of foreign states from judicial process in the United States. Prior State Department policy⁷⁰ and its judicial variations are examined because they are the historic precedent against which the new statute will be construed and on which it seeks to improve. The Foreign Sovereign Immunities Act of 1976 is examined because it is now the positive law in the area. Finally, international law standards are examined to show the new legislation's compliance with these standards and to reveal the unnecessary generosity with which it grants immunity in the United States.

A. Commercial Activities

Since 1952⁷¹ the State Department purported to adhere to the "restrictive theory" of sovereign immunity. The crux of the restrictive theory is that foreign states are not immune for their commercial acts. The Department announced adoption of the restrictive theory in a letter dated May 19, 1952, from Acting Legal Adviser Jack B. Tate to the Acting Attorney General--the "Tate letter."⁷² The letter devoted only one sentence to a description of the new policy: "According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis)."⁷³ Since issuance of the Tate letter, the Department added to that enigmatic sentence only one interpretation of general application. In determining whether the acts in question are

public or private, the Department announced it would look to the "nature" of the activity and not the foreign state's "purpose" for undertaking the activity or the "character" of the instrumentality performing the activity.⁷⁴

The record of individual State Department determinations has not been especially helpful in clarifying the distinction between public and private acts. The Department has ruled that conduct of a state shipping industry is a private act not entitled to immunity.⁷⁵ It has also ruled that activities carried on as lessee or owner of consular or embassy premises are private acts.⁷⁶ The activities of state banks have been held to be private acts,⁷⁷ though the activities in issue were performed to promote some governmental policy,⁷⁸ or because of monetary controls imposed by the state,⁷⁹ or as part of a general nationalization of property.⁸⁰ The Department has been inconsistent, however, in classifying acts relating to an extraordinary commercial relationship with a private party entered into to satisfy some urgent public need.⁸¹ Like the classic case proposed by commentators--a contract to sell boots to the army⁸²--these activities could easily be classified as either public or private acts under the restrictive theory.⁸³

Since Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes,⁸⁴ it has been well-established that courts would apply the restrictive theory of immunity even in the absence of a State Department determination.⁸⁵ The restrictive theory applied by the courts, however, was not always identical to the one applied by the Department. In adopting State Department policy, the court in Victory Transport made its own interpretation of the restrictive theory. The court interpreted it to mean that immunity would be denied unless the act in question clearly came

within one of the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive. Such acts are generally limited to the following categories:

- (1) internal administrative acts, such as expulsion of an alien
- (2) legislative acts, such as nationalization
- (3) acts concerning the armed forces
- (4) acts concerning diplomatic activity
- (5) public loans.

We do not think that the restrictive theory adopted by the State Department requires sacrificing the interests of private litigants to international comity in other than these limited categories.⁸⁶

Some courts have simply applied these criteria and have not sought to determine current State Department policy, as the reasoning in Republic of Mexico v. Hoffman⁸⁷ requires.⁸⁸

Ad hoc interpretations of the restrictive theory by the courts have for the most part been like those of the State Department, but occasional differences have occurred which made forum shopping by the foreign sovereign profitable in some cases. The courts have ruled that activities by state banks,⁸⁹ commercial shipping contracts,⁹⁰ contracts of sale,⁹¹ and the operation of a passenger airline⁹² are private acts. The courts have also ruled that the succession of a state to its deceased king's property⁹³ and nationalization of private property⁹⁴ are public acts. Like the State Department, the courts have been inconsistent in classifying occasional acts of a commercial nature undertaken for some clearly public purpose.⁹⁵ But the courts have shown a greater inclination than the State Department to be moved by the purpose, rather than the nature, of activities for which immunity is sought.

In addition, the United States has entered into a series of bilateral Treaties of Friendship, Commerce and Navigation with various countries by which the signatories have agreed that no immunity shall be extended to state "enterprises" engaged in commercial activities.⁹⁶ When a state commercial enterprise of a signatory is impleaded in American courts, these treaties seemed to require denial of immunity regardless of current State Department of judicial policy.⁹⁷ The initiation of process against a state-owned commercial vessel in the territorial sea may similarly have been controlled by international agreement.⁹⁸

The Foreign Sovereign Immunities Act of 1976 substantially reproduces the latest State Department interpretation of the restrictive theory, while preserving the force of those international agreements to which the United States is a signatory dealing with foreign state immunity.⁹⁹ Newly enacted 28 U.S.C. § 1605 generally implements the restrictive theory:

- (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

* * *

- (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a

commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;^{99a}

Newly enacted 28 U.S.C. § 1603 codifies the State Department policy of looking to the nature, as opposed to the purpose, of an activity to determine whether it is a private or public act:

For the purposes of this chapter--

* * *

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.¹⁰⁰

Taken as a whole, in the absence of a treaty of international agreement to the contrary, the Foreign Sovereign Immunities Act of 1976 denies immunity for acts commercial in "nature" which, aside from questions of immunity, American courts have jurisdiction to adjudicate.¹⁰¹

The Foreign Sovereign Immunities Act of 1976 embodies and is consonant with international requirements of immunity. International law in the nineteenth century required that foreign states be given immunity from the jurisdiction of municipal courts except in matters concerning immovable property or succession to decedents' estates. It recognized no exception to this rule for commercial activities undertaken by the state, in part because few states extensively engaged in commerce.¹⁰² In this century, however, increases in the commercial activities undertaken by states and greater demands for state responsibility have caused the absolute rule of immunity to dissolve. Today, state judicial practice, bilateral treaties and multilateral conventions, and the opinions of commentators¹⁰³ make clear that customary international law no longer prescribes sovereign immunity from judicial process in municipal courts in matters that are "private," "commercial," or jure gestionis in character. International law does require immunity in actions based on "governmental," "sovereign," or jure imperii acts, however.

State practice in the field of state immunity is in disarray. Of the thirty-one states with reported positions, twelve--Argentina, Austria, Belgium, Egypt, Eire, France, the Federal Republic of Germany, Greece, Italy, the Netherlands,

Switzerland, and the United States¹⁰⁴--do not extend immunity in cases grounded on nongovernmental or commercial acts. Nine states--Australia, Burma, Canada, India, Poland, Rumania, the U.S.S.R., and the United Kingdom¹⁰⁵--appear to follow the absolute rule of immunity, in some cases conditioned on reciprocity. The position of the remaining ten states--Brazil, Chile, Denmark, Japan, Jordan, Luxembourg, Madagascar, Norway, Sweden, and Turkey¹⁰⁶--is unclear. The fact that so many commercially significant nations now follow the restrictive view of immunity without retaliation is strong evidence that international law does not require the absolute rule of immunity.

A significant number of international conventions and bilateral agreements implement the restrictive theory of immunity in special areas. The first convention to do so was the Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels.¹⁰⁷ It subjected signatory states and their commercial vessels and cargo to judicial process for matters involving the operation of such vessels to the same extent as private persons. The Convention on the Territorial Sea and the Contiguous Zone,¹⁰⁸ a more recent convention, limits the immunity of state-owned commercial vessels operating within the forum state's territorial waters. Immunity for state vessels used for commercial purposes is also denied by the International Convention on Civil Liability for Oil Pollution Damage.¹⁰⁹ In view of these conventions, there can be no expectation among effective elites that the world community requires immunity for state vessels in commercial use. The European Convention on State Immunity,¹¹⁰ a convention of more general applicability among the signatory members of the Council of Europe, also adopts a form of the restrictive theory of immunity. It denies signatory states immunity from suit on certain contracts, for activities related to a state industrial, commercial or financial agency established within the forum state, and in certain patent matters.¹¹¹

A number of nations have entered into bilateral agreements restricting the extent of their immunity from judicial process.¹¹² In various bilateral Treaties of Friendship, Commerce and Navigation entered into by the United States, for example, each sovereign has disclaimed any immunity from judicial process, including execution, for an "enterprise" of the sovereign engaged in commercial activity.¹¹³ The later treaties add language to explicitly include within the term "enterprise" a corporation, association and government agency or instrumentality.¹¹⁴ Similarly, the 1972 US-USSR Trade Agreement provided that Soviet Foreign Trade Organizations would not claim or enjoy in the United States "immunities from suit or execution of judgment with respect to commercial trans-

actions.¹¹⁵ Although the Soviet Union favors the absolute rule of immunity, it has entered into a number of such agreements restricting the immunity of its trade delegations from suits relating to commercial transactions.¹¹⁶ Moreover, a number of states, including the United States, have refused to request immunity in cases involving commercial activities.¹¹⁷

Both the resolutions of learned societies and the writings of individual commentators generally support the restrictive view of immunity. The Harvard Research in International Law,¹¹⁸ resolutions of the International Law Association,¹¹⁹ Institut de Droit International,¹²⁰ and Inter-American Bar Association,¹²¹ and reports of the Inter-American Judicial Committee¹²² and Asian-African Legal Consultative Committee¹²³ would all restrict immunity to cases based upon non-commercial activities of the foreign state. A small number of scholars, while recognizing state practice to the contrary, continue to adhere to the absolute rule of immunity.¹²⁴ However, the greater number believe that international law permits the exercise of jurisdiction over foreign states for their commercial acts, either because international custom is too confused to enforce any rule of law on the subject¹²⁵ or because the restrictive theory has been adopted by custom.¹²⁶

State practice, in the form of municipal decisions and international agreements, and scholarly opinion thus make clear that international law does not require sovereign immunity in matters related to non-governmental activities.¹²⁷ International law is less clear about the criteria by which a state activity is to be characterized as commercial or non-commercial. Emerging state practice permits the forum state to apply its own standards in characterizing the activity. Increasingly, the "nature" test adopted by the Foreign Sovereign Immunities Act of 1976, and the State Department and American courts before it, has been used.¹²⁸ While that test is not strongly supported by treaty practice,¹²⁹ commentators generally agree that a nation is free to apply its own standards, including the "nature" test, in characterizing a state activity so long as it extends immunity for certain hard core governmental activities.¹³⁰ Thus, in denying immunity from actions based on a foreign state's commercial acts, the Foreign Sovereign Immunities Act of 1976 embodies and is consonant with international law standards of immunity.¹³¹

B. Execution

Before its recommendation of the bill which was eventually enacted as the Foreign Sovereign Immunities Act of 1976, the State Department's long-held view had been that the property of a foreign sovereign is in all cases immune from execution

to satisfy a judgment or other debt against the sovereign.

[T]he Department has always recognized a distinction between "immunity from jurisdiction" and "immunity from execution." The Department has maintained the view that in accordance with international law property of a foreign sovereign is immune from execution to satisfy a judgment obtained in an action against a foreign sovereign where there is no immunity from suit.¹³²

The Department's policy forbade execution, although (1) the property had already been attached to obtain jurisdiction,¹³³ (2) it is used for commercial purposes, or (3) it is real property.¹³⁴

The courts have also consistently held that the property of a foreign sovereign is immune from execution.¹³⁵ The only cases in which immunity from execution has not been recognized by a court have been where the immunity had been waived¹³⁶ or where the immunity was asserted after the execution sale had taken place.¹³⁷

The immunity from execution enjoyed by foreign states under prior American law was applicable to attempts to enforce international arbitral awards, as well. Congress' implementation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States¹³⁸ left intact the immunity of foreign sovereigns from execution.¹³⁹ Thus, absent a foreign state's waiver of immunity from enforcement of an award, the enforcement provisions of the Convention were completely emasculated in the United States.

The Foreign Sovereign Immunities Act of 1976 retreats substantially from the absolute immunity from execution previously recognized by the State Department and the courts. Newly enacted 28 U.S.C. § 1611 establishes certain categories of assets of foreign states, their political subdivisions, or agencies or instrumentalities thereof that are immune from execution in all cases. Absolute immunity is extended if:

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank,

authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.¹⁴¹

Unless otherwise provided by treaties and other international agreements to which the United States is a signatory, other assets are immune unless they fall within categories established by newly enacted 28 U.S.C. § 1610.¹⁴²

Newly enacted 28 U.S.C. § 1610 withdraws immunity from execution only in carefully limited circumstances. Paragraph (a) of that section withdraws the immunity of assets of a foreign state or of its political subdivisions, agencies, and instrumentalities used for commercial activities with the United States from execution of judgments entered after the effective date of the act, but only if the foreign state has had a "reasonable period of time" to voluntarily satisfy the judgment^{142a} and one of the following conditions is met:

(1) the judgment being executed is based on the same commercial activity for which the assets are or were being used; (2) the judgment being executed establishes rights in property taken in violation of international law or property exchanged for such property, or property acquired by succession or gift, or real property not diplomatically immune; (3) the foreign entity has waived its immunity from execution; or (4) the property being executed against is proceeds or the right to proceeds of a policy of casualty or liability insurance covering the claim merged into the judgment being executed.¹⁴³ Paragraph (b) of newly enacted 28 U.S.C. § 1610 withdraws the immunity from execution of assets of agencies or instrumentalities of foreign states engaged in commercial activities within the United States, whether or not those assets are used in a commercial activity, if the agency or instrumentality has had a reasonable time to satisfy the judgment voluntarily and if the agency or instrumentality has waived its immunity or the judgment being executed relates to a claim for which the agency or instrumentality is not immune by virtue of subparagraphs (2), (3) or (5) of newly enacted 28 U.S.C. § 1605(a) or by virtue of newly enacted 28 U.S.C. § 1605(b).¹⁴⁴

The Foreign Sovereign Immunities Act of 1976 appears

not only to be consonant with but also to go beyond the minimum immunity from execution required by international law. International law seems to permit execution of validly obtained judgments against a foreign state's real property or property in commercial use. Authority for this observation is not as persuasive as that supporting the restrictive view of immunity from suit. But state practice is sufficiently disparate to prevent expectations that an absolute rule of immunity from execution is required. Although some states that follow the restrictive rule in regard to suits nevertheless recognize absolute immunity from execution,¹⁴⁶ eight states--Austria, Belgium, pre-WW II Czechoslovakia, Egypt, Italy, the Netherlands, Singapore, and Switzerland--have permitted execution against a foreign state's immovable property or property not devoted to public use, without its consent.¹⁴⁷ These states have not created exceptions for the funds of state banks, property unrelated to the judgment being executed, or nondiplomatic real property not in commercial use. Moreover, it does not appear that states whose commercial property has been executed against have protested the executions as contrary to international law.¹⁴⁸

A number of international conventions and bilateral treaties and agreements permit execution of judgments against the commercially-used property of foreign state signatories. The Brussels Convention¹⁴⁹ permits execution against state-owned commercial vessels of judgments based on commercial activities of the vessels. The Geneva Convention on the Territorial Sea¹⁵⁰ limits the immunity from execution of state-owned commercial vessels operating within the forum state's territorial waters. The European Convention on State Immunity,¹⁵¹ on the other hand, is somewhat less restrictive of immunity from execution. It permits execution of a validly obtained judgment against the assets of a political subdivision, agency or instrumentality of a foreign state, but prohibits execution against the central government's assets, regardless of their character, unless both the foreign state and the forum state have signed declarations of their intention to apply a more restrictive rule of immunity.¹⁵² In addition to the conventions, a number of nations have entered into bilateral agreements restricting their immunity from execution.¹⁵³ In various bilateral Treaties of Friendship, Commerce and Navigation entered into by the United States, for example, each state has disclaimed immunity from execution against its corporations, associations, agencies and instrumentalities engaged in commercial activities within the forum state.¹⁵⁴ The Soviet Union has also entered into a number of trade agreements, including one with the United States in 1972, in which it has

waived immunity from execution for property held by its trade delegations.¹⁵⁵

Resolutions of several learned societies and the opinions of a few influential commentators support the restrictive view of immunity from execution. The Harvard Research in International Law¹⁵⁶ and resolutions of the Institut de Droit International¹⁵⁷ and the Council of the International Bar Association¹⁵⁸ would permit execution against a foreign state's immovable or commercial property. The works of Lauterpacht, Lalive, Garcia-Mora, Sørensen, Sucharitkul, Sweeney, and Monroe Leigh, the current Legal Adviser, support this position.¹⁵⁹ On the other hand, a report of the Asian-African Legal Consultative Committee as well as works by other commentators support the absolute rule of immunity.¹⁶⁰

State practice, in the form of international agreements and judicial decisions, and the views of commentators are too divided on the question of immunity from execution to create expectations that international responsibility would follow execution against commercially-used or real property of a foreign state. Practice and opinion support the conclusion of a study prepared for the State Department in 1963:

Taken as a whole, the sources of international law indicate that there is no rule of absolute immunity for the property of a foreign state. The common core of the absolute and restrictive concepts of immunity of property is immunity of property connected with public acts of the state. As to property connected with commercial and other private acts of the state, immunity is not required; such property may be attached and executed upon.¹⁶¹

Moreover, international law has not created exceptions from the restrictive rule of immunity for the assets of state banks, property unconnected with the judgment being executed, or non-diplomatic real property not in commercial use. Thus, in the area of executions against the property of foreign states, the Foreign Sovereign Immunities Act of 1976 appears to be more generous--and prior American practice has been substantially more generous--to foreign states than is required by international law.

C. Attachment to Acquire Jurisdiction

Prior to its recommendation of the bill which was eventually enacted as the Foreign Sovereign Immunities Act of 1976,

the State Department's policy was that the property of a foreign sovereign used in commercial activities could be attached for purposes of acquiring in rem or quasi-in-rem jurisdiction if the sovereign were not immune from the suit sought to be brought. For the first few years after adoption of the restrictive theory announced in the Tate letter,¹⁶² it was Department policy that, regardless of that theory, "under international law property of a foreign government is immune from attachment and seizure."¹⁶³ Because in personam jurisdiction was so difficult to acquire over foreign states, this policy diminished the effectiveness of the restrictive theory. In 1959, therefore, the Department announced a reversal of its policy. A letter from the Legal Adviser, Loftus Becker, stated the Department's new view to be that, "where under international law a foreign government is not immune from suit, attachment of its property for the purpose of obtaining jurisdiction is not prohibited."¹⁶⁴

Judicial precedent has mirrored State Department policy. Before 1959 the courts generally held that even the commercially engaged property of a foreign sovereign is immune from attachment.¹⁶⁵ After 1959, the courts adopted the new State Department position.¹⁶⁶ There remained, however, a body of case law that could be applied to permit attachment of property, regardless of its character, that is not owned and possessed by the sovereign.¹⁶⁷

The Foreign Sovereign Immunities Act of 1976 retreats from the earlier State Department position and makes assets of a foreign state or political subdivision, or their agencies and instrumentalities, absolutely immune from pre-judgment attachment except for the purpose of acquiring jurisdiction in the case where the sovereign has waived its immunity.¹⁶⁸ At the same time, however, foreign states are made subject to in personam jurisdiction by service of process on the minister of foreign affairs by mail or through the State Department by note in the absence of other means provided by an arrangement with the sovereign or an international convention.¹⁶⁹ Because such means of acquiring jurisdiction are thought less disruptive of a foreign state's governmental activities than attachment of property,¹⁶⁹⁻¹ they would be made the exclusive means of acquiring jurisdiction.

No nation except the United States seems to make a distinction in its practice between granting immunity from execution of foreign state property and immunity from attachment. Nor do the conventions, treaties, or commentators make such a distinction.¹⁷⁰ Therefore, since the world community permits a forum state to execute against the commercial property of a foreign state but forbids it to execute against publicly used property, it a fortiori permits attachment of state property

to the same extent. As a result, the prior American practice, which permitted prejudgment attachment of commercial assets, was in substantial compliance with international law. The Foreign Sovereign Immunities Act of 1976 is more restrictive of private rights than international law requires it to be, though the importance of the restriction is offset to some extent by liberalized means of obtaining jurisdiction.¹⁷¹

D. Political Subdivisions, Agencies and Corporations

Prior to its recommendation of the bill which was eventually enacted as the Foreign Sovereign Immunities Act of 1976, the State Department seems to have extended to all the political subdivisions, agencies and instrumentalities of a state the same immunity from judicial process enjoyed by the state itself.¹⁷²

The courts have been somewhat less liberal in granting immunity to subdivisions and instrumentalities of the foreign sovereign. The immunity of political subdivisions¹⁷³ and organic arms of the central government¹⁷⁴ had been firmly established, but the courts split on whether an independent corporate entity, owned, organized or controlled by a foreign sovereign to achieve some public or commercial purpose, should share the same immunity as the sovereign.¹⁷⁵

Both the State Department and the courts have stated that immunity should be granted to the defendant in an action which in substance adjudicates a foreign state's rights, though not nominally against the state itself.¹⁷⁶

The Foreign Sovereign Immunities Act of 1976 extends to "a political subdivision," an "agency" or an "instrumentality" of a foreign state substantially the same immunities enjoyed by the state itself.¹⁷⁷ Two distinctions are made between states and their subdivisions, on the one hand, and their agencies and instrumentalities on the other. First, the agencies and instrumentalities may be served with process by somewhat different means.¹⁷⁸ Second, all the non-exempt assets of a commercially engaged agency or instrumentality within the United States--not just those related to the claim being enforced, and not merely particular types of or particularly used property--may be subject to execution under defined circumstances.¹⁷⁹ Otherwise foreign governmental agencies and instrumentalities enjoy the same immunity as their state.

With the exception of decisions in the United States and India, state practice seems uniformly to deny sovereign immunity to the political subdivisions--constituent states and municipalities--of a foreign state.¹⁸² In the area of suits against state agencies or corporations substantially owned by a foreign state, state practice is less decisive. A survey of

case law made in 1963 found that civil law countries denied immunity to agencies and corporations that were distinct legal entities, while common law countries granted immunity to such bodies when their relationship to the state make them in fact part of the government.¹⁸³ The conclusion about civil law practice seems to have been based on the practice of Egypt, Italy and France, however. Subsequent decisions indicate that Belgium and the Netherlands now support the common law rule.¹⁸⁴ Moreover, even the civil law nations have permitted immunity on an agency theory when the separate agency or corporation has acted on behalf of the central government.¹⁸⁵ In view of the emergence of the restrictive rule of immunity, state judicial practice can therefore be said to extend sovereign immunity to agencies and state corporations performing governmental, non-commercial acts and to deny immunity to political subdivisions and to agencies and corporations in all other circumstances.

The European Convention on State Immunity¹⁸⁶ substantially follows state judicial practice in regard to the immunity of separate state agencies and corporations. Proceedings against such bodies are permitted unless they are based on acts exercising a "sovereign authority (acta jure imperii)."¹⁸⁷ However, constituent states of a federation are permitted immunity in the same circumstances and may enjoy the full immunity of the federal state itself if a declaration to that effect is made.¹⁸⁸ Other treaties make specific provision only for separate enterprises engaged in commercial activities.

Finally, the commentators are in agreement that international law requires only the immunities recognized by the state judicial practice described above.¹⁸⁹ As a result, the immunity granted to political subdivisions by the Foreign Sovereign Immunities Act of 1976 is not required by international law, while the act's treatment of agencies and state corporations substantially embodies the international law standard.

E. Waiver

Prior to its recommendation that Congress enact the bill which became the Foreign Sovereign Immunities Act of 1976, the State Department had made no statement of policy on the effect of a sovereign's prior waiver of immunity. The Department had denied on grounds of waiver a claim to immunity from a counter-claim¹⁹⁰ and had made clear that a prior contractual waiver of immunity should be enforced.^{190a} But, although it seemed likely that it was ordinary State Department policy to give effect to a prior waiver of immunity, actual Department determinations did not form a perfectly consistent pattern.¹⁹¹

The courts have held that a foreign state may waive its immunity to suit, attachment or execution, and that subsequent claims to immunity are then ineffective.¹⁹² However, if the State Department recognized and allowed the claim to immunity notwithstanding a prior waiver, the courts gave effect to the Department's decision.¹⁹³ A waiver was accomplished by making, without reserving the right to later assert a claim to immunity, any appearance in the action except a special appearance to raise the question of jurisdiction. Thus, taking depositions,¹⁹⁴ moving for a postponement of the return date,¹⁹⁵ and entrance of a general appearance¹⁹⁶ have been held to be waivers of sovereign immunity. The waiver was effective though the foreign state's legal representative is not specifically authorized to make it.¹⁹⁷ When a foreign state itself filed an action, it waived immunity on a counterclaim, even one based on a different subject matter, to the extent of its affirmative judgment.¹⁹⁸ A foreign state might also contractually waive its immunity before the cause of action arose.¹⁹⁹

The Foreign Sovereign Immunities Act of 1976 codifies without change existing American policy on waivers of immunity by foreign states and makes clear that a later retraction of the waiver is ineffective unless the waiver reserved the state's right to retract it.²⁰⁰ A waiver can be accomplished in one of three ways under the legislation. First, it can be done "explicitly"--by agreement with the plaintiff or by treaty.²⁰¹ Second, a waiver can be done "implicitly"--presumably by making the type of court appearance held to constitute a waiver under prior law.²⁰² Third, a waiver may result from the foreign state's invocation of judicial process in the United States. Newly enacted 28 U.S.C. § 1607 would make initiation of or intervention in an action a waiver of immunity from a counterclaim--

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.²⁰⁴

The Foreign Sovereign Immunities Act of 1976, in the manner in which it gives effect to waivers of immunity by foreign states, is consonant with international law requirements. International law proscribes only unsent exercises of judicial power in certain cases. It therefore recognizes that a foreign state which has waived its immunity may be subjected to judicial process. Waiver may take the form of an express agreement or conduct which clearly implies that the foreign state will not assert its immunity. Thus, state practice has been to deny immunity where the foreign state has by treaty, contract, or tacit agreement indicated its intention not to claim immunity.²⁰⁵ Waiver may also take the form of conduct which the forum state has made clear will result in a loss of immunity. Thus, initiation of, intervention in, or making a defense on the merits to judicial proceedings may constitute a waiver of immunity from the proceeding itself, set-offs, related counterclaims in excess of the foreign state's recovery, and sometimes execution of an unfavorable judgment.²⁰⁶ Waiver has also been used as a rationale for denying immunity for the commercial acts of foreign states.²⁰⁷ Even commentators who oppose restrictions of immunity in other areas would give effect to a waiver of immunity.²⁰⁸

F. Public Debt

Before enactment of the Foreign Sovereign Immunities Act of 1976, American policy regarding the immunity of foreign sovereigns from actions to enforce their public debt was unclear. Existing judicial precedent extended immunity from such actions to political subdivisions as well as the central governments themselves,^{208a} but it was established before the State Department's "restrictive theory" was announced in the Tate letter.^{208b} State Department policy before the Tate letter was unclear,^{208c} and the Tate letter did not clarify it. Unfortunately, the Foreign Sovereign Immunities Act of 1976 does nothing to improve the situation.

The Foreign Sovereign Immunities Act of 1976, as enacted, is ambiguous with regard to whether a foreign state is immune from judicial process to enforce its public debts. In the form first recommended by the administration, the codification extended to a foreign state absolute immunity, absent a waiver, from suits to collect on its public debt, but absolutely denied immunity from such suits to the state's political subdivisions, agencies and instrumentalities.²⁰⁹ No immunity for actions under federal securities laws was provided, however.^{209a} In the form in which it was introduced in the House of Representatives in the Ninety-Fourth

Congress, the language concerning the debt of agencies and instrumentalities of foreign states disappeared.²¹⁰ Before enactment, the section dealing with public debt was deleted altogether. Therefore, whether foreign sovereigns will be immune from suits to enforce their public debt under the codification will depend upon whether issuance of their bonds is interpreted to be "a particular commercial transaction or act," according to its "nature," affecting the United States.²¹¹

International law until recently seemed to require the immunity of foreign states from actions to collect on their public obligations.²¹² Only Switzerland had permitted actions on public debt of the foreign state itself.²¹³ Actions on the obligations of political subdivisions were more common.²¹⁴ The European Convention on State Immunity,²¹⁵ however, has created substantial support for the Swiss practice. The Convention permits actions on public debts of signatory states which have payment obligations that must be met in the forum state.²¹⁶ Since issuers usually provide for payment the principle of and interest on their bonds by a paying agent located within the sales market, the Convention in effect permits actions on public issues of debt in the courts of states in which they are initially sold. A second source of recent support for the Swiss practice has been the increasing willingness of foreign states to waive their immunity from such actions. Private lenders usually require foreign state borrowers to waive their immunity from suits to enforce their obligations on the loan.²¹⁷ Waivers have also typically been included in state bonds issued in the European market and, more recently, in the American market.²¹⁸ In Eurobonds the state often waives immunity from execution, as well.²¹⁹ Moreover, the commentators and cases that have reduced the international law requirements of immunity to a core of protected activities have not included the issue of public debt on their lists.²²⁰

Developing state practice reveals that states do not consider immunity from suits on their public obligations to be as important as the interest reduction they presumably receive by waiving immunity. Since a municipal rule denying immunity from judicial proceedings on the public debt of a foreign state would accomplish the same result, and since voluntary waivers are so common, it is unlikely that a forum state would incur international responsibility by entertaining unconsented suits on the public debt of a foreign state. It therefore cannot be said that international law proscribes such exercises of jurisdiction.

G. International Law Violations, Real and Gifted Property, and Physical Injuries

The Foreign Sovereign Immunities Act of 1976 provides for three additional categories of circumstances in which a foreign state is not immune from suit.

Newly enacted 28 U.S.C. § 1605(a)(3) provides that a foreign state is not immune from suit in any case

in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.²²¹

The effect of this section is to deny immunity from any action to which the Sabbatino Amendment²²² prevents application of the "act of state doctrine."²²³ This section together with the sections on immunity from execution²²⁴ permits a plaintiff whose property had been expropriated by a foreign state and turned over to its petroleum production instrumentality doing business in the United States, for example, to bring suit against the instrumentality and levy against its assets in the United States. The foreign state could be sued only if it retained possession of the property and brought it, or consideration received for it, to the United States pursuant to a commercial activity, however. This section is without precedent in prior publicly revealed State Department policy and is inconsistently supported by old precedent in case law.²²⁵

It seems clear enough that exercise of jurisdiction to enforce international law is not itself a violation of international law. This principle is surprisingly difficult to document, however. A number of municipal decisions have permitted adjudications of acts of state alleged to be in violation of international law, but these actions have been between private parties or have been initiated by the foreign state itself.²²⁶ This practice, together with the opinion of commentators, is sufficient to establish that international law does not require an "act of state doctrine" in the face of such an allegation.²²⁷ But it does not establish that an allegation

in an action against a foreign state that its public act was in violation of international law creates an exception to the sovereign immunity which the foreign state would otherwise enjoy. On the other hand, there is no clear authority to the effect that foreign state immunity survives in such a case.^{227a} Therefore, the answer must be found elsewhere.

The conclusion that international law does not require foreign state immunity in the face of a claim that the state has violated international law rests on two considerations of public policy. First, it is more important to the world community to enforce its "law" against its members than to protect the immunity of its members from suit. Sovereign immunity has developed in international law because it adds stability to the process by which members of the world community interact. Public order can best be maintained if the territorial sovereign alone prescribes and enforces legal standards for the way in which it rules its subjects within its territory. But a requirement more important to the preservation of world public order is that the territorial sovereign must confine its acts to those permitted by international law where such acts have transnational effects, as when they affect foreign citizens. Often international law is enforced with more consistency and less friction through municipal courts than by political sanctions. Therefore, since the world community needs municipal courts to enforce its prescriptions, it would not limit their jurisdiction when international law is at stake. Second, a system of law which protects the title of parties who have taken property without the compensation required by international law, and invalidates the title of those who have purchased from them for value is commercially unworkable and patently objectionable. As a result, enforcement of international law by judicial action against purchasers from foreign states is not an adequate solution. For these reasons, it is unlikely that any nation would expect to incur international responsibility for exercising jurisdiction to apply international law against a foreign state. Therefore, international law cannot be said to proscribe newly enacted 28 U.S.C. § 1605(a)(3).²²⁸

Newly enacted 28 U.S.C. § 1605(a)(4) provides that a foreign state is not immune from suit in any case

in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue.²²⁹

This section codifies a passage in the Tate letter which stated that "sovereign immunity should not be claimed or

granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.²³⁰ No State Department or judicial denial of immunity appears to have been expressly based on such grounds, however.²³¹

It is well settled in international law that foreign state immunity need not be extended in cases dealing with rights to interests in real property²³² or interests in locally administered decedents' estates.²³³ The immunity of diplomatic property from "search, requisition, attachment or execution," established by the Vienna Convention on Diplomatic Relations²³⁴ and customary international law²³⁵ is preserved by other sections of the codification.²³⁶ Therefore newly enacted 28 U.S.C. § 1605(4) is consistent with international law.

Newly enacted 28 U.S.C. § 1605(5) provides that a foreign state is not immune from any suit

in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment

unless the claim is based on a discretionary act or arises out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.²³⁷ The effect of this section is to allow actions for physical injuries to person or property against a foreign state even though the activities which gave rise to the injury were not commercial and within 28 U.S.C. § 1605(2).²³⁸ Foreign states will not be liable for punitive damages in such actions;^{238a} nor will they be subjected to a jury trial unless the action is brought in state court or arises on some basis of jurisdiction other than the foreign public character of the defendant.^{238b} There is no precedent for this section in prior State Department or judicial policy.

The principal object of newly enacted 28 U.S.C. § 1605(5) is to permit tort victims in automobile accidents with foreign state agents performing acta jure imperii to recover damages from the foreign state.²³⁹ International law does not prohibit such actions. Although state practice, both before and after the Second World War, has been to grant immunity in cases arising out of accidents involving military

vehicles,²⁴⁰ the more recent tendency has been to permit actions arising out of collisions with diplomatic vehicles, usually rationalized by contorted interpretations of acta jure gestionis or the principle of waiver.²⁴¹ In addition, the European Convention on State Immunity²⁴² contains a provision substantially identical to proposed § 1605(5).²⁴³ Moreover, the Vienna Convention on Consular Relations of 1963 expressly abolished the immunity of consulate officials from claims for "damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft." In fact, international law in general has become increasingly concerned with the protection of human rights,²⁴⁵ a goal the newly enacted section would promote.²⁴⁶ In view of these recent developments, it is unlikely that the United States would incur international sanctions for permitting a suit in circumstances described by 28 U.S.C. § 1605(a)(5).

H. Political Considerations

When the State Department was the organ which established and applied standards of foreign state immunity, there was an unspoken component of the standards applied by the State Department that could outweigh all other considerations combined. It was the extent of political repercussions that would result from subjecting the foreign state to suit.^{246a} Though application of the objective criteria discussed earlier in this article dictated that a foreign state should not be entitled to immunity in a particular case, it was State Department policy nonetheless to recognize and allow the state's claim to immunity if United States' foreign policy objectives would be significantly promoted thereby. Although the State Department never expressly admitted this policy, several of its responses to requests for immunity left no doubt as to its existence.²⁴⁷

The courts not only speculated that the State Department took political considerations into account in making sovereign immunity determinations, they urged the Department to do so and held such considerations to be proper ingredients of the decision. The Supreme Court's abdication to the State Department in Ex parte Republic of Peru²⁴⁸ was motivated by a belief that the Department could take such considerations into account more effectively than the courts. Similar reasoning has prevented the courts from reviewing the State Department's decisions. The court in Spacil v. Crowe,²⁴⁹ for example, refused to review State Department recognition and allowance of the defendant's claim to immunity because

the degree to which granting or denying a claim of immunity may be important to for-

eign policy is a question on which the judiciary is peculiarly ill-equipped to second-guess the executive. The executive's institutional resources and expertise in foreign affairs far outstrip those of the judiciary. . . . Perhaps more importantly, in the chess game that is diplomacy only the executive has the view of the entire board and has an understanding of the relationship between isolated moves. Will granting immunity serve as a bargaining counter in complex diplomatic negotiations? . . . Will it preclude a significant diplomatic advance; perhaps a detente between this country and one with whom we are not on the best speaking terms? These are questions for the executive, not the judiciary.²⁵⁰

Other courts have made similar observations.²⁵¹

Although it has been observed that political considerations influenced State Department determinations of immunity claims much less than is believed,²⁵² some determinations are explicable only as political decisions. Spacil v. Crowe²⁵³ is an example. In that case two Chilean corporations attached in the Canal Zone the M/V Imias, a vessel owned by a Cuban corporation whose vessels had failed to fulfill a contract to deliver sugar and left a Chilean harbor with unloading cranes belonging to one of the plaintiffs immediately after Dr. Allende was deposed as President. The complaints charged breach of contract and conversion. The latter offense was a continuing one which took place in American territory as the ships passed through the canal. The Cuban corporation's activities were clearly commercial. The State Department's objective standards seemed to dictate that immunity be denied. Nonetheless, the Department recognized the Cuban Government's claim to immunity, relayed by the Czechoslovakian ambassador. The determination is explicable only as an attempt to placate United States-Cuban relations and to facilitate negotiations with Panama over the canal at the expense of private expectations.²⁵⁴

A second example is Rich v. Naviera Vacuba, S.A.²⁵⁵ In that case the Bahia de Nipe, a commercial vessel owned by the Government of Cuba, was libeled in the Eastern District of Virginia by a longshoreman to satisfy a judgment against Cuba, by Mayan Lines, S.A. to satisfy a consent judgment against Cuba in connection with which Cuba stipulated to a waiver of immunity from execution, by United Fruit Sugar

Company to claim ownership of the cargo which it alleged had been confiscated in violation of international law, and by the master and crew for wages. The ship had been brought to Hampton Roads by the barratry of the master and crew. The State Department made assurances that the vessel would be released and issued a suggestion of immunity, though all the circumstances--commercial activity, waiver, and a taking of property present in the United States in violation of international law--indicated that no immunity should be extended. The State Department's decision was apparently an attempt to bargain for Cuba's release of hijacked airplanes at the expense of the libellants.²⁵⁶ It was politically motivated.²⁵⁷

In the absence of a State Department determination, the courts usually did not take political considerations into account in ruling on claims to immunity. Rather, the assumption made was that the Department's failure to act indicated a lack of political considerations in the case.²⁵⁸ However, there is a body of earlier case law to the effect that immunity may be extended only to "friendly" sovereigns, not states unrecognized by or which have severed diplomatic relations with the United States.²⁵⁹ This precedent seemed directly contrary to State Department practice, which was to extend immunity to those countries whose relations with the United States were most shaky.²⁶⁰

1. The Effect of Immunity

The view of the courts has been that dismissal of an action on sovereign immunity grounds does not bar the claim of the private plaintiff; it merely relegates him to other means of enforcing it. The courts often equated a decision by the State Department to recognize a claim of immunity with a decision by the Department to pursue the claim diplomatically, rather than through the courts. The Court in Ex parte Republic of Peru,²⁶¹ which established the binding nature of State Department suggestions, took this view.²⁶² One reason courts were so willing to allow the State Department to bar a claimant's access to the courts may have been because they expected the Department to assist him in satisfying his claim by other means.

In practice, however, if the Department denies a claimant's right to proceed against a foreign state in court, it probably will not espouse his claim diplomatically. Even if it does espouse the claim, there are several reasons for believing the claim will not be fully satisfied. First, the State Department will not espouse a claim unless the claimant has had continuous United States nationality²⁶³ and until he has exhausted local remedies or shown that they are

unavailable.²⁶⁴ Second, unless a breach of international law is involved, it is Department policy not to formally espouse the claim in order to prevent the Department from becoming an international "collecting agency."²⁶⁵ Third, the Department purports to have unfettered, unreviewable discretion in deciding whether to espouse a claim.²⁶⁶ Often political considerations prevent immediate espousal.²⁶⁷ Finally, once the Department has decided to espouse a claim, it has complete discretion and authority, not revocable by the claimant, to settle the claim or even release it.²⁶⁸ Political considerations are often influential in this decision as well.²⁶⁹

A foreign state which seeks immunity from suit in an American court may often provide no remedy for the plaintiff in its own territory. Therefore, when the courts dismiss a private party's action against a foreign state, "[t]he private party in most cases is not likely to have other remedies."²⁷⁰ Dismissal on sovereign immunity grounds is in effect a denial of the claim. The foreign state is not merely immune from suit, attachment, or execution; it is altogether immune from satisfying the individual's claim.

IV. A CRITIQUE

Criticism of prior sovereign immunity law which resulted in enactment of the Foreign Sovereign Immunities Act of 1976 was directed more at the national constitutive process--the institutional framework in which standards for immunity are prescribed and applied--than at the substantive criteria which that process produced. Both deserved criticism. The Foreign Sovereign Immunities Act of 1976 goes a long way toward eliminating the criticized features of prior law, although like all legislation it is somewhat short of perfect.

A. Procedural Criticism

Each nation must, within the limits of international law, prescribe its own standards to determine in which circumstances its courts will exercise jurisdiction over foreign states. These standards may provide for less sovereign immunity than is required by international law,²⁷¹ subjecting the forum state to international sanctions, or they may as a matter of national policy provide for immunities in excess of international law requirements. Each nation must also apply the standards it has prescribed to individual cases. As the discussion in Part I of this article has shown, prior to enactment of the Foreign Sovereign Immunities Act of 1976 the United

States made the following allocation of these prescriptive and applicative functions among its domestic institutions:

(1) The State Department prescribed the basic criteria by which sovereign immunity claims were decided; both the State Department and the courts made prescriptive, sometimes conflicting, interpretations of these criteria. (2) Either the State Department or the courts made authoritative applications of sovereign immunity prescriptions to individual cases, depending upon the choice of the foreign state. This allocation was inadequate because the State Department is institutionally incapable of efficiently performing either task and because neither task can be effectively divided among independent branches of government.

The Foreign Sovereign Immunities Act of 1976 makes profound changes in the allocation of prescriptive and applicative functions. It extends authority to determine claims to immunity to the courts alone and commands them to apply the standards prescribed by Congress. The act greatly improves the existing process by removing the applicative function from the State Department. However, by substituting a statute for State Department and international law prescriptions, Congress has made difficult the continuing adoption of American standards to the evolving standards of international law.

1. The Prescriptive Process

The State Department was a poor organ to prescribe the standards of decision because it may be institutionally biased in favor of extensive immunity. In order to determine whether, as a matter of national policy, this country should recognize more extensive immunity than is required by international law, it is necessary to balance the inconveniences to American nationals and effects on the national economy resulting from an extension of sovereign immunity against the effect on the nation's diplomatic relations with other countries from an exercise of jurisdiction. Grants of immunity prevent disturbances in our foreign relations and may help in attaining some prized foreign policy objective. Since the State Department, as an institution, is judged by its ability to attain such objectives, it may be institutionally biased in favor of prescribing a greater degree of immunity than either international law or national policy dictate.²⁷¹⁻¹

The process by which sovereign immunity law was prescribed in the United States was inadequate, too, because it failed to produce a single body of law against which all individual claims could be judged. Rather, as Part II of this article has shown, it generated two bodies of law--State Depart-

ment policy and judicial precedent--each different in detail, either of which might be applied to a foreign state's claim to immunity. As a result, the prescriptive process produced a degree of uncertainty which discouraged both private traders and foreign states from dealing with each other.^{271a}

Finally, while it had the authority to prescribe standards of decision, the State Department either failed to adopt detailed standards or inadequately publicized them.^{271a-1} Not only did it fail to release a description of its standards more detailed than the single sentence found in the Tate letter,²⁷² it also failed to accompany its ad hoc decisions with reasoned analysis of each case's controlling factors.²⁷³ As a result, State Department policy was a mystery to all but Department insiders, leisured and interested students, and corporations whose foreign dealings are extensive enough to warrant thorough research by their attorneys. Others--foreign states and private traders alike--lacked the detailed knowledge required to adequately plan their transnational transactions.

The Foreign Sovereign Immunities Act of 1976 provides answers to these criticisms. By exercising Congress' authority to prescribe standards of decision, it substitutes for the State Department a prescriptive institution capable of weighing all considerations in the national interest. By excluding the State Department from any role in applying the Congressional standards, the codification insures that it will generate only a single body of authoritative interpretations--those of the federal courts. And by describing the standards of decision in detail in a statute accessible to all, the codification adequately publicizes them.

The chief fault of the Foreign Sovereign Immunities Act of 1976 is that it freezes a body of American law motivated by international law requirements at a time when those requirements are evolving in a way that demands an extension of immunity in fewer and fewer circumstances. In the last century, international law demanded that foreign states be extended absolute immunity from judicial process. Today, international law requires immunity in fewer instances than does the codification. Yet, if one or two decades hence, international law requirements become even more--or less--restrictive of immunity, action by Congress--never an easily moved organ--will be needed to take advantage of or conform to the change. Congress might have been wiser if it had enacted legislation that required the courts alone to resolve claims to immunity, but directed the State Department to promulgate the standards of decision by rulemaking. One would expect the State Department to be more sensitive than Congress to the changing winds of international law.²⁷⁴

2. The Applicative Process

The most popular object of criticism in the national constitutive process by which claims to sovereign immunity were decided before enactment of the Foreign Sovereign Immunities Act of 1976 was the State Department's role in authoritatively applying the standards of decision.²⁷⁵ Because of the State Department's role, the applicative process has injured American foreign relations, has been inconsistent and unpredictable in its outcomes, may have been occasionally mistaken in its application of law to fact, and gave rise to forum-shopping by foreign states which embarrassed the executive and judiciary alike.

Both injury to our foreign relations^{275a} and inconsistencies in applications^{275b} have resulted from the State Department's willingness to be influenced by political considerations in determining claims to immunity. It is clear that the courts expected the State Department to take political circumstances into consideration. It was also inevitable that the State Department should do so. The State Department as an institution is charged with the conduct of our foreign affairs. Its success or failure, and the success or failure of its officials, is judged by the extent to which American foreign policy objectives are achieved. The State Department has, therefore, an inevitable institutional bias in favor of immunity decisions with favorable foreign affairs effects. Added to this was the courts' constant exhortations for the Department to be moved by foreign affairs considerations. The result was that the possibility of improving relations with a claimant or of obtaining a valued concession was an irresistably enticing factor in the Department's determination of foreign states' claims to immunity.²⁷⁶

The supreme irony of American sovereign immunity law was that, while decision-making power was given to the State Department to prevent disturbance of America's foreign relations, the Department's exercise of that power had the opposite effect. Two factors were responsible for this irony. First, State Department denial of immunity created the appearance to a foreign state claimant that it was politically disfavored by the United States, especially since the Department was supposed to take foreign relations into account in making its determination.²⁷⁸ If the denial were made by the courts, the foreign state could more easily believe that it was based on non-partisan application of objective standards.²⁷⁹ Second, foreign states which realized that the Department's determinations were influenced by political considerations sometimes politicized the issue of immunity in order to avoid litigation.²⁸⁰ For this reason, it has been observed that judicial determina-

tion of claims to sovereign immunity without regard to political developments of the moment would be in the best interests of American foreign policy.²⁸¹ It is significant that the State Department itself has recently adopted this view.²⁸²

In addition, the State Department is more likely than the courts to misapply applicable standards because it is institutionally inferior in performing the functions required to make a sovereign immunity decision.²⁸³ To determine whether immunity is warranted, a decision-maker under the restrictive theory must first make a number of factual findings--e.g., that the activity involved a contract to ship commercial merchandise or that an agent of the sovereign was in charge of its property--then apply legal principles to those facts--e.g., that there is no immunity for an activity commercial in nature or that a sovereign in possession of property is immune. State Department hearings, unlike other agencies' hearings, lacked mechanisms to generate the kind of factual record on which an immunity decision must be made.²⁸⁴ No oral testimony was permitted. The Department had no power to require oaths to be sworn. The private litigant lacked power to subpoena the sovereign to discover facts to which the sovereign had greater access. Submissions by the sovereign were not open to cross-examination. Moreover, State Department officials ruling on the claim--ultimately the Legal Adviser and Secretary of State--lacked the experience of the judiciary in applying complex legal principles to a factual context.²⁸⁵ As a result, State Department determinations were not only inconsistent because of the intrusion of political considerations, but were also probably wrong an appreciable number of times.

Finally, the ability of both the State Department and courts to authoritatively determine claims to immunity, each applying distinctive standards of decision, gave rise to forum-shopping reminiscent of the days before Erie R. Co. v. Tompkins.²⁸⁶ The ability of foreign states to choose among marginally different legal standards not only created added uncertainty, it also was a source of embarrassment to the nation.

The Foreign Sovereign Immunities Act of 1976 greatly improves the process by which standards of decision are applied. The codification defines the circumstances in which immunity will and will not be granted without reference to ad hoc political considerations and makes no provision for participation by the State Department in applying these standards. It is therefore unlikely that immunity decisions under the statute would be politically influenced.²⁸⁷ Designation of the courts alone as the institution before which immunity

claims would be decided will also end forum-shopping and improve the quality of individual decisions.

B. Substantive Criticism

The standards of sovereign immunity formerly prevailing in the United States extended immunity to foreign states in many circumstances in which immunity is not required by international law. The Foreign Sovereign Immunities Act of 1976 on the whole restricts immunity more than prior law, but it too is in some instances more generous to foreign states than international law requires. In order properly to evaluate the codification and the law it supplants, it is first necessary to isolate the instances in which they extend immunity without compulsion by international law and to examine the competing interests which have resulted in prescriptions of immunity in these instances. It is then possible to criticize the prescriptions in question for failing to achieve the goals of prevailing participants or for their inconsistency with values more basic to American government in general.

1. Commercial Activities

In theory the restrictive theory permits actions between an alien and a foreign state whenever they are based upon commercial activities and some basis for jurisdiction exists. In practice, political considerations have been used to recognize sovereign immunity in such actions, though immunity might have been denied if an American national had initiated the action.²⁸⁸ The Foreign Sovereign Immunities Act of 1976 codifies this practice by granting immunity from actions which lack a substantial relationship to the United States, though other bases for jurisdiction exist.²⁸⁹ Thus, both prior practice and the new legislation place an extra burden on alien plaintiffs. Needless to say, this burden is not required by international law.²⁹⁰

The purposes of this national prescription are not entirely clear. It may have been simply the result of a crude attempt by State Department draftsmen to prevent an exercise of jurisdiction for which there is no international law basis. However, it is difficult to believe that the draftsmen were unaware that an alien, consistent with international law, could enforce against a foreign state an arbitral award based on an activity unrelated to the United States, for example.²⁹¹ It is more likely that the requirement of substantial contact was introduced to anticipate the fears of the business com-

munity in general that the United States would otherwise become an international collection agency, to the injury of its trade with foreign states.²⁹² Since such a provision is opposed to the interests of alien traders only, it is an irresistible prescription for a national constitutive process.

2. Execution

Without compulsion from international law, prior American policy prohibited execution against the immovable or commercial assets of a foreign state.²⁹³ The Foreign Sovereign Immunities Act of 1976 permits execution against commercial property related to the activity which served as the basis of the judgment being executed, but maintains the immunity of unrelated commercial property. It also maintains the immunity of bank deposits made by foreign state banks, regardless of the purpose for which the deposits had been made or their relation to the judgment sought to be enforced.²⁹⁴

The retention of these immunities seems to mark a victory of domestic businesses over international traders and investors. Domestic businesses realize that any restriction of immunity from execution could have an inhibiting effect on investment by foreign states in the American capital market, especially by states which contemplate avoiding their obligations.²⁹⁵ It is likely, on the other hand, that international traders and investors with potential claims against foreign states would like to be able to enforce those claims against all the commercial assets of those states in the United States.²⁹⁶ The codification's solution is a carefully structured compromise. Assets especially important to the American economy--the deposits of foreign state banks--are given absolute immunity.²⁹⁷ Other assets can be levied against if they are related to the claim being enforced, but not if they are general investments of the foreign state defendant. Thus, an American oil company with a contract dispute with a state with which it has a concession agreement could recover oil brought into the United States by that state, but could not reach the state's investments in the stock of American corporations to satisfy its claim. Because Petrodollars and Eurodollars now play important roles in American finance, it is likely that the Treasury Department, a new participant in the process by which sovereign immunity standards are determined, has exerted its influence to limit restrictions on the immunity of foreign state assets from execution.

From the international perspective, immunity of a state's commercial property from execution has a number of deleterious effects. To the extent that dispute resolution by municipal courts or arbitral tribunals, rather than diplo-

matic espousal, is more efficient and more consistent in commercial circumstances because of its isolation from tangential political considerations, an effective means of enforcing the world community's ordering system upon foreign states is lost.²⁹⁸ Diplomatic resolution of commercial disputes also lacks the stability needed to reduce international traders' perception of risk and therefore inhibits the overall level of commercial interaction between state traders and other countries.²⁹⁹ In addition, the lack of an effective means of enforcing state responsibility forces states which observe their responsibilities to absorb part of the cost of obligation avoidance by other states, since private traders in adjusting price terms to reflect risk cannot accurately predict which states will avoid their obligations in the future. Some of these considerations may be responsible for the hostility of commentators to immunity from execution.³⁰⁰

3. Attachment

Although prior law permitted pre-judgment attachment of a foreign state's commercial assets, the Foreign Sovereign Immunities Act of 1976 prohibits pre-judgment attachments for the purpose of acquiring jurisdiction, substituting other forms of process.³⁰¹ Immunity of commercial property from attachment is not required by international law.

The forces responsible for the compromise on execution immunity are probably responsible for the change in policy on attachments, as well. It is reported that foreign states are aggravated by prolonged arrest of their assets or the expense of posting bond.³⁰² Attachment has the same effect as execution upon property, except the deprivation is temporary, and so may have the same effect as execution on the investment policies of foreign states. It is therefore opposed by domestic businesses. At the same time, the ability to implead a foreign state in personam has made attachment less important to international traders and investors. Because the act permits the execution only of commercial property related to the claim being enforced, however, it is likely that attachments for the purpose of conserving assets for later execution, permitted by newly enacted 28 U.S.C. § 1610(d), will be widely employed.

4. Political Subdivisions

Both prior American practice and the Foreign Sovereign Immunities Act of 1976 extend to the political subdivisions, agencies, and instrumentalities of a foreign state substantially the same immunities extended to the foreign state it-

self.³⁰³ International law, on the other hand, seems never to require the immunity of political subdivisions from judicial process. It is not clear whether any reason for the more generous American policy exists other than the basic incongruity of distinguishing between levels of government in granting immunity for public acts.³⁰⁴

5. Waiver

Both prior American practice and the Foreign Sovereign Immunities Act of 1976 give effect to waivers of immunity made before or after the act upon which the plaintiff's claim is based, notwithstanding purported revocations of the waiver not contemplated by its original terms.³⁰⁵ An earlier draft of the codification appeared to give effect to unexpected revocations of waivers of immunity, however. But there is no reason for permitting such a revocation. Clearly, neither international traders and investors nor foreign states are benefited by the foreign state's ability to revoke a waiver. The traders and investors are unable to contract for security and may be unfairly surprised by revocation of a waiver for which they have expressly contracted. At the same time, foreign states will be prevented from contracting for an adjustment in the price term or from attracting investment by waiving immunity from suit and execution if private parties are aware that the waiver is unenforceable. Fortunately, the codification as enacted withdrew the power of a foreign state to revoke its waiver of immunity.

6. Public Debt

Early American law recognized the immunity of both foreign states and their political subdivisions from actions based on their public debt, although the status of this precedent after the Tate letter was unclear. The position of the Foreign Sovereign Immunities Act of 1976 is equally unclear, though an earlier draft of the legislation extended immunity from such actions.³⁰⁷ No immunity from suit to enforce the debt of a foreign state seems required by international law.

The decision to provide for immunity from suits to enforce a foreign state's debts in an earlier draft of the codification appears to have been motivated by the desire to protect the American securities industry by making American capital markets more attractive to foreign state borrowers. The State Department observed that "[m]any national governments are unwilling to issue their securities in a foreign country which subjects them to actions based on such securities."³⁰⁸

Therefore the earlier draft preserved immunity from actions to enforce a foreign state's debt "to facilitate the U.S. role as one of the principal capital markets of the world, which in some ways has dwindled during the past years."³⁰⁹ However, it is not clear why a foreign state would not adjust to a withdrawal of immunity by including a choice of forum clause in its debt instruments rather than withdrawing from an otherwise attractive capital market. Such a provision would permit it, in effect, to contract for immunity, just as private investors and underwriters now contract for waivers. On the other hand, since the rule of immunity is so easily altered by contract in the case of foreign public debt, preservation of some immunity in this area would seem to do no harm.

7. International Law Violations

The Foreign Sovereign Immunities Act of 1976 withdraws immunity in cases to determine rights in certain property taken in violation of international law.³¹⁰ There appears to be no reason why international law would not permit an exercise of jurisdiction over a foreign state in any case in which a violation of international law is alleged and there exists a basis of jurisdiction to adjudicate, regardless of whether the violation alleged was a deprivation of property rights or a deprivation of human rights. It is not clear why the more circumscribed rule has been adopted in the United States. It may be based on a belief that the Act of State doctrine would prevent adjudication of cases not within the section anyway. However, the Act of State doctrine appears to be rapidly disintegrating in the face of international law.³¹¹ The more restricted rule may also be based on the absence of any international state practice supporting such an exception from immunity. A more likely explanation, however, is that only deprivations of property rights seem important enough to American policy makers and the American business community to warrant the strain such a suit would create in our relations with the defendant state.

8. Political Considerations

Prior American law permitted the State Department to impose immunity if the political ramifications from exercising jurisdiction were serious enough to outweigh the benefits of solving the dispute judicially.³¹² This policy was clearly nationally prescribed and not required by international law. It is not continued by the terms of the Foreign Sovereign

Immunities Act of 1976.

The commentators are in near unanimous agreement that the State Department must be free to interfere with exercises of jurisdiction over foreign states when extraordinary foreign policy considerations dictate that immunity be granted.³¹³ They differ primarily in the form such interference should take and in who should pay the cost of the suit's dismissal. Most scholars, while recognizing the need to return decision-making authority to the courts, would have permitted the State Department to issue a binding suggestion of immunity if and only if required by foreign policy considerations.³¹⁴ The defeated private claimant would bear the cost of improving American foreign relations if unable to otherwise satisfy his claim. A minority of scholars would permit the State Department to interfere with jurisdiction for political reasons only if it compensated the plaintiff whose suit is dismissed.³¹⁵ The Department could either issue a bond on behalf of the favored foreign state and be subrogated to the private plaintiff's claim or it could issue a binding suggestion and pay the plaintiff the fair value of his claim.

If immunity must be imposed in some cases because of ad hoc foreign policy considerations, there are sound reasons for requiring the nation to compensate the private party whose claim is thereby defeated. First, compensation would erase much of the risk of an unexpected imposition of sovereign immunity perceived by private traders and investors. It would therefore remove one of the barriers to increased intercourse with state traders and the less mature nations. Second, requiring the State Department to compensate defeated plaintiffs would force the decision-maker in an alleged national emergency to take into account the true cost of improving relations with a sovereign defendant. It would provide strong incentive for the Department to choose more efficient means of improving relations if they exist and to impose immunity only when clearly required. Finally, compensation of private parties whose claims are defeated in the interest of the nation as a whole is required by the sense, if not the positive prescriptions, of the Fifth Amendment.³¹⁶ If immunity would benefit American foreign policy in the interests of the entire nation, the entire nation should bear its cost. Private traders and investors should not be forced to play roulette to determine who will be taxed to support our foreign policy.

Among the above instances in which the Foreign Sovereign Immunities Act of 1976 extends immunity to foreign states without compulsion of international law, only suits by aliens and a wider degree of execution would clearly injure American interests in the short run. In the long run, even standards

of immunity which permitted suits by aliens and execution against all of a foreign state's commercial property would probably cause little damage to American interests. Suits by aliens to enforce obligations of foreign states are feared because the absence of similar remedies in the aliens' own countries would make American courts attractive as international collection agencies. Execution is feared because it would give foreign states incentive to invest in markets in which the immunity of their assets is recognized. If America's withdrawal of immunity in such cases accelerated the trend by which sovereign immunity is being restricted in all the nations of the world, however, as there is reason to believe it would, these fears would become groundless in the long run. Aliens would not burden American courts more than Americans would be initiating suits in foreign courts. Foreign states would not be tempted to invest in other countries because execution would be permitted there, too, though some incentive would remain for foreign states to invest domestically. Whether the United States should continue to grant immunity unilaterally in such cases, then, depends upon its willingness to absorb temporary and limited injury to the American economy in the interests of building a world order in which the commercial obligations of foreign states are enforced judicially, *i.e.*, with more consistency and less friction than by means of intergovernmental espousals. To this writer, the expense does not seem too great.

C. Conclusion

The process by which the law of foreign state immunity was prescribed and applied in the United States prior to enactment of the Foreign Sovereign Immunities Act of 1976 had many shortcomings. That law was authoritatively prescribed and applied by an institution which was inadequate to the task because it is institutionally biased, it lacks the expertise to make factual applications of law, it failed to generate and publicize detailed standards of decision, and it was inconsistent in its applications, being constantly influenced by ad hoc political considerations. Moreover, dividing the authority to apply sovereign immunity law between the State Department and the courts created further inconsistencies and resulted in embarrassing forum-shopping.

The Foreign Sovereign Immunities Act of 1976 is not a perfect substitute for the previously existing law. It freezes this nation's codification of a doctrine of customary international law at a time when that doctrine is in flux. It also extends immunity in several instances in which it appears

to be unwarranted. Despite its drawbacks, however, enactment of the Foreign Sovereign Immunities Act of 1976, by limiting immunity in cases in which it was previously granted, publicizing detailed standards of decision, and removing the State Department from the decision-making process, has greatly improved prevailing law.

What can be expected from this improvement? From the world's perspective, two results can be expected to follow. A small, but not negligible, improvement in the means by which foreign states are made accountable for their acts will occur. At the same time, a marginal, but not meaningless, increase in intercourse among all governments and people can be expected. It might be hoped that that intercourse will take the form of an exchange of goods, services and ideas that will increase the world's production of all preferred values, rather than a trade in arms to Haiti and its counterparts, described at the beginning of this article, that will increase the world's capacity to destroy itself.

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1. It is not known whether Professor Lowenfeld demanded payment in advance for his services. Attorneys representing foreign state clients should be alerted to the fact their claims for fees, as well as the claims of their adversaries, may be defeated by foreign state immunity. See *Miller v. Ferrocarril Del Pacifico de Nicaragua*, 137 Me. 251, 18 A.2d 688 (1941).

2. "Sovereign immunity" and "foreign state immunity" will be used interchangeably throughout. "Sovereign immunity" as used in this paper refers to immunity of the foreign sovereign only. It does not refer to the related but distinguishable immunity of the domestic sovereign. "Foreign state" as used in this paper, unless the context indicates otherwise, includes any political subdivision, agency, or other instrumentality of a foreign state which is entitled to the immunity enjoyed by the state itself.

3. *Aerotrade, Inc. v. Republic of Haiti*, 376 F. Supp. 1281 (S.D.N.Y. 1974); see generally Lowenfeld, "Litigating a Sovereign Immunity Claim--The Haiti Case," 49 N.Y.U. L. Rev. 377 (1974) [hereinafter cited as Lowenfeld]. *Aerotrade's* application to attach accounts of the Banque Nationale de la Republique d'Haiti in an effort to bring a "back stop" action directly against the bank was dismissed the same day on procedural and substantive grounds. *Aerotrade, Inc. v. Banque Nationale de la Republique d'Haiti*, 376 F. Supp. 1286 (S.D.N.Y. 1974). *Aerotrade* was likewise unsuccessful in a later attempt to mandamus the President to terminate foreign aid to Haiti or to report to Congress that he refused to implement the sanctions of the Hickenlooper Amendment. *Aerotrade, Inc. v. Agency for International Development, Department of State*, 387 F. Supp. 974 (D.D.C. 1974).

3a. 26 Dept. State Bull. 984 (1952). See text at note 72 infra.

4. Pub. L. No. 94-583, 90 Stat. 2891, 28 U.S.C. §§ 1330, 1332(a)(2), (3) and (4), 1391(f), 1441(d), 1602 et seq. (1976). The Foreign Sovereign Immunities Act of 1976 was an administration bill, drafted and recommended by the Departments of State and Justice. It is the product of a decade of work by those departments, which began a study of possible legislation and first recommended a version of the act to the ninety-third

Congress in 1973. See S. 566, 93rd Cong., 1st Sess. (1973); H.R. 3496, 93rd Cong., 1st Sess. (1973). S. 566 and H.R. 3493 were each referred to the respective Judiciary Committee. Hearings were held on H.R. 3493 on June 7, 1973. "Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary," 93rd Cong., 1st Sess., ser. 10 (1973) [hereinafter cited as "Hearing"]. The legislation was not reported out of either committee in the Ninety-Third Congress. A modified version of the legislation was submitted to the Ninety-Fourth Congress and introduced by request in the fall of 1975 as H.R. 11315. Two days of hearings were held before a subcommittee of the House Judiciary Committee in June, 1976. As a result of the hearings, the bill was reported to the floor in amended form. See H.R. Rep. No. 94-1487, 94th Cong., 2nd Sess. 1-6 (1976) [hereinafter cited as Report]. The bill was passed by the House of Representatives on September 9, 1976, 122 Cong. Rec. H. 11587 (daily ed. Sept. 29, 1976), passed by the Senate on October 1, 1976, 122 Cong. Rec. S. 17721 (daily ed. Oct. 1, 1976), and approved by the President on October 21, 1976. The Foreign Sovereign Immunities Act of 1976 is effective January 19, 1977.

4a. ____ U.S. ____, 96 S.Ct. ____, 48 L.Ed.2d 301 (1976).

4b. See note 223 infra.

4c. In a footnote to its Report accompanying the Foreign Sovereign Immunities Act of 1976, the House Judiciary Committee interpreted Dunhill as an indication that the courts will not apply the "act of state" doctrine to acts for which a foreign state is entitled to no sovereign immunity under the act and approved that interpretation. Report, supra note 4, at 20 n.1.

5. This article will consider neither the personal immunity from judicial process enjoyed by diplomatic personnel and personal sovereigns nor the immunity of military forces stationed in foreign countries, since these immunities seem either well-regulated by international conventions and agreements or of little relevance to contemporary American experience. Nor will the article treat immunities of foreign states from prescriptions of the forum state, such as property or income tax, traffic laws, and the like. Rather, the article deals only with the immunity of foreign states and their political subdivisions and instrumentalities from the power of American courts to enforce prescriptions applicable to such entities.

6. See McDougal, Lasswell and Reisman, "The World Constitutive Process of Authoritative Decision," 19 J. Legal Ed. 253, 403 (1967), for a more complete outline of the world constitutive process than that presented by this author.

7. To constitute international "law" as opposed to practice there need not be an expectation that the community's prescriptions will be rigorously enforced by application of negative sanctions. The amount of control required varies according to the context. Moreover, enforcement may take the form of promised reciprocities in return for a participant's observance of the standards prescribed, as well as retaliations for their infraction. Still, "a structure of legality must go beyond words to expectations that are substantially corroborated by deeds." See *id.*, at 258.

8. McDougal, "The Impact of International Law upon National Law: A Policy-Oriented Perspective," 4 *S. Dak. L. Rev.* 25, 68 (1959) [hereinafter cited as McDougal].

9. Thus, Law of the Union of Soviet Socialist Republics No. 526, enacting Principles of Civil Procedure of the Soviet Union and the Union Republics, provides foreign sovereigns with absolute immunity from suit or execution without their consent, but permits the Council of Ministers or other authorized body to withhold immunity from any foreign sovereign that does not extend the Soviet Union reciprocal treatment. 6 M. Whiteman, *Digest of International Law* 563-64 (1968) [hereinafter cited as Whiteman].

10. Thus, the Asian-African Legal Consultative Committee, in its Third Session at Colombo, Ceylon, in 1960, reported that

[i]t was recognized by all delegations that a decree obtained against a foreign state could not be executed against its public property. The property of a state trading organization which has a separate juristic entity may, however, be available for execution.

The delegates believed states to be immune from suits based on their public acts, but believed separately incorporated state trading entities enjoyed no immunity. See *id.* at 572-74.

11. See, e.g., *Pacific Molasses Co. v. Comite de Ventas de Mielles de la Republica Dominicana*, 30 Misc. 2d 560, 219 N.Y.S.2d 1018, 1020 (Sup. Ct. 1961).

12. It is common practice for foreign governments to waive their immunities in loan agreements with institutional lenders and in public debt issues. See text accompanying notes 217-219 *infra*.

13. Foreign offices have had formal authority to grant or deny claims to sovereign immunity in no major nation except the United States. See Report, *supra* note 4, at 7; "New Departures in the Law of Sovereign Immunity," [1969] *Proc. Am. Soc'y Int'l L.* 182, 202 [hereinafter cited as "New Departures"];

Comment, "Proposed Draft Legislation on the Sovereign Immunity of Foreign Governments: An Attempt to Revest the Courts with a Judicial Function," 69 Nw. U. L. Rev. 302, 316 (1974) [hereinafter cited as "Proposed Draft Legislation"]. However, foreign offices have varying degrees of influence on the decisions of municipal courts, which they communicate through certificates or other means. In nations where the courts are especially deferential to the views of the foreign office, the latter institution is the effective decision-maker.

14. To be complete, it should be noted that American policy also influences the international law outcome outside its domestic courts. Several conventions and numerous bilateral treaties to which the United States has adhered require their signatories to grant or refuse immunity in narrowly defined cases. See text accompanying notes 113-15, 154-55 infra. Of course, when America's influence on international sovereign immunity law is exerted through the creation of treaties, Congress and the State Department share national participation in the prescriptive function. The Justice Department also plays a role in the prescription and invocation of international law by claiming immunity or causing the State Department to claim immunity in judicial proceedings against the United States in foreign lands. See text accompanying note 117 infra; Timberg, "Sovereign Immunity, State Trading, Socialism and Self-Deception," 56 Nw. U. L. Rev. 109, 124 (1961) [hereinafter cited as Timberg]; cf. note 71 infra.

15. It is a matter of indifference to the world community which domestic institution within a nation applies international law so long as international law is observed.

From the perspective of world power and social processes . . . there is indeed no need for a state to adopt any special principles or procedures for making customary international law authority within its boundaries. The influence of inclusively prescribed policies depends not so much upon internal arrangements as upon the impact of external variables in the world power process--including all potential reciprocities and threatened retaliations--which drive a decision-maker toward conformity or non-conformity. . . . The insistent pressures of the world power process imposes certain sources and content of authority, sustained by effective sanctions, upon internal decision-makers if they are to maximize the values of the national community with which they identify.

McDougal, supra note 8, at 69.

16. 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812). Two earlier lower court decisions, *Moítez v. The South Carolina*, F. Cas. No. 9,697 (Adm. Ct., Pa. 1781), and *Moxon v. The Fanny*, F. Cas. No. 9,895 (D. Pa. 1793), had granted immunity to foreign sovereign libelees. However, the opinion in *The South Carolina* was so cryptic that it did not disclose whether the libeled ship was owned by a foreign country or one of the rebelling colonies. And the decision in *The Fanny* turned more on a lack of standing to challenge the offense, a seizure by an armed French schooner in American territorial waters, than on immunity of the libeled ship.

17. 11 U.S. (7 Cranch) at 144.

18. Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.

11 U.S. (7 Cranch) at 146.

19. 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943)..

20. 324 U.S. 30, 65 S.Ct. 530, 89 L.Ed. 729 (1945).

21. The case involves the dignity and rights of a friendly foreign state; claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State. When the Secretary elects, as he may and as he appears to have done in this case, to settle claims against the vessel by diplomatic negotiations between the two countries rather than by continued litigation in the courts, it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court.

* * *

. . . [T]he courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly foreign sovereign, as to embarrass the

executive arm of the Government in conducting foreign relations. "In such cases, the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." United States v. Lee, 106 U.S. 196, 209. More specifically, the judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune. . . . Upon recognition and allowance of the claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libellant to the relief available through diplomatic negotiations. . . . This practice is founded upon the policy, recognized both by the Department of State and the courts, that our national interest will be better served in such cases if the wrongs to the suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings.

318 U.S. at 586-89.

22. Id. at 589.

23. See text accompanying notes 40-44 infra.

24. Republic of Mexico v. Hoffman, 143 F.2d 854, 855, 858-59 (9th Cir. 1944), aff'd, 324 U.S. 30 (1945). The United States Attorney's submission to the court did cite two prior cases which could have been taken as authority for denial of the claim to immunity.

25. 324 U.S. at 38.

26. 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389 (1955).

27. 348 U.S. at 358.

28. Id. at 365.

29. Id. at 366-71. A related reason for doubting the Supreme Court's sincerity in assigning the prescriptive function to the State Department is that the opinion in Republic of Mexico failed to overrule an earlier decision, Berizzi Brothers Co. v. S.S. Pesaro, 271 U.S. 562, 46 S.Ct. 611, 70

L.Ed. 1088 (1926), in which the Court had granted immunity in circumstances for which the State Department had recommended that no immunity be granted. See notes 71 and 85 *infra*. The majority in Republic of Mexico found Berizzi Brothers distinguishable and therefore declined to overrule it unnecessarily. 324 U.S. at 35 n.1. Two concurring Justices recommended that Berizzi Brothers be overruled and that the decision in Republic of Mexico be based on the State Department's previous recommendations that there be no immunity for commercial activities. *Id.* at 39-42.

30. An example of reliance on circuit court interpretation is Aerotrade, Inc. v. Republic of Haiti, 376 F. Supp. 1281 (S.D.N.Y. 1974), discussed at text accompanying notes 1-3 *supra*. While the note of the Haitian Ambassador requesting immunity was pending before the State Department, Professor Lowenfeld discovered remarks made by the State Department's Legal Adviser and the Chief of the Justice Department's Foreign Litigation Unit before a subcommittee of the House Judiciary Committee which indicated that the State Department would consider a contract between a foreign government and a U.S. company for guns for its armed forces an activity commercial in nature and therefore not one for which the foreign government would be immune from suit in American courts. See "Hearing," *supra* note 4, at 19. See also the remarks of a Deputy Legal Adviser in "New Departures," *supra* note 13, at 184. However, dicta in Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2nd Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), interpreted the State Department's restrictive policy of immunity to include "acts concerning the armed forces" within the category of governmental activities immune from suit. Professor Lowenfeld therefore chose the district court as the forum in which to make Haiti's claim. On the basis of Victory Transport, the court upheld the claim, ignorant of or unconcerned with the State Department's latest pronouncement. See also Premier Steamship Co. v. Embassy of Algeria, 336 F. Supp. 507, 509-10 (S.D.N.Y. 1971).

On the other hand, if a court were informed of recent State Department interpretations, it might have given effect to those interpretations despite judicial precedent to the contrary. An example is Renhard v. Humphreys & Harding, Inc., 381 F. Supp. 382 (D.D.C. 1974), in which a plaintiff homeowner sued the Republic of Brazil for damages to his home incurred during construction on the Brazilian Embassy. The State Department, which ruled that the activities involved were of a nongovernmental nature, declined to recognize or allow the Brazilian Ambassador's claim to immunity. Informed that since 1967 the State Department had looked to the "nature," rather

than "purpose," of activities under suit in deciding whether to grant immunity, the court gave effect to the State Department interpretation by denying Brazil's request for immunity.

31. Claims to immunity in state court proceedings, as well, have been determined according to federal standards. The state courts have for the most part accepted as binding federal sovereign immunity law. See, e.g., *State ex rel. National Institute of Agrarian Reform v. Dekle*, 137 So. 2d 581, 582-83 (Fla. App.), cert. denied, 146 So. 2d 753 (Fla. 1962); *Republic of Cuba v. Dixie Paint & Varnish Co.*, 104 Ga. App. 854, 123 S.E.2d 198 (1961); *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 51, 242 N.E.2d 704, 295 N.Y.S.2d 433, 439 (1968); *Chemical Natural Resources, Inc. v. Republic of Venezuela*, 420 Pa. 134, 215 A.2d 864, cert. denied, 385 U.S. 802 (1966). The Foreign Sovereign Immunities Act of 1976 expressly controls the grant of foreign state immunity in state court proceedings. Sec. 4(a), 90 Stat. 2891, 28 U.S.C. §§ 1604-05 and 1607-11 (1976). Prior to its enactment, whether a foreign sovereign was entitled to immunity from suit in a state court may have been a federal question on the authority of *Zschernig v. Miller*, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968), which invalidated a state statute limiting the rights of certain nonresident aliens to inherit property within the state because it interfered with the federal government's conduct of foreign relations, and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), in which the Court held application of the act of state doctrine in a federal court action based on diversity of citizenship to be a question of federal law, reasoning that

. . . an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.

Compare Henkin, "The Foreign Affairs Power of the Federal Courts," 64 *Colum. L. Rev.* 805 (1964), and Jessup, "The Doctrine of *Erie Railroad v. Tompkins* Applied to International Law," 33 *Am. J. Int'l L.* 740 (1939), with Edwards, "The Erie Doctrine in Foreign Affairs Cases," 42 *N.Y.U. L. Rev.* 674 (1967).

32. Prior to its enactment, a superficial reading of existing Title 28 of the United States Code could have led one to believe that Congress had given the district courts jurisdiction over foreign sovereigns regardless of their claims to

immunity. Title 28 provided that the district courts shall have original jurisdiction of civil actions, where the amount in controversy exceeds \$10,000, between

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C. § 1332(a). The courts have held that Congress in passing such legislation did not intend to supersede the doctrine of sovereign immunity, however. See *Berizzi Brothers Co. v. S.S. Pesaro*, 271 U.S. 562, 576, 46 S.Ct. 611, 70 L.Ed. 1088 (1926); *The Pesaro*, 255 U.S. 216, 218, 41 S.Ct. 308, 65 L.Ed. 529 (1921). Section 2, paragraph (b), of the International Organizations Immunity Act, 59 Stat. 669, 22 U.S.C. § 288a(b) (1945), supports this interpretation. It provides:

International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceeding or by the terms of any contract.

32a. See note 287 *infra*.

33. 303 U.S. 68, 58 S.Ct. 432, 82 L.Ed. 667 (1938).

34. See Restatement (Second) of Foreign Relations Law § 71 (1965) [hereinafter cited as Restatement (Second)]. In *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74, 58 S.Ct. 432, 82 L.Ed. 667 (1938), the Court held proper a suggestion made by the British Ambassador directly to the district court. The Court said that the foreign sovereign may assert its claim "either through diplomatic channels or, if it chooses, as a claimant in the courts of the United States." An earlier Supreme Court case, *Ex parte Muir*, 254 U.S. 522, 532, 41 S.Ct. 187, 65 L.Ed. 383 (1921), had recited the same options, but had said that use of official State Department channels was the correct procedure, and in a case decided the same year, the Court reversed a dismissal on sovereign immunity grounds, in part because the claim had not been made through the State Department. *The Pesaro*, 255 U.S. 216, 219, 41 S.Ct. 308, 65 L.Ed. 529 (1921). Before The Navemar, several confused lower courts required that the claim be made through the State Department. *E.g.*, *The Sao Vicente*, 295 F. 829, 832 (3rd Cir. 1924); *The Secundus*, 15 F.2d 711, 712 (E.D.N.Y. 1926). Recent precedent in the Second Circuit required that claims to immunity be made through the State De-

partment after the court had acquired jurisdiction over property in an in rem proceeding. *Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce, Purchase Directorate*, 326 F.2d 117, 118 (2d Cir. 1964), modified per curiam en banc, 360 F.2d 103 (2d Cir. 1966); *Puente v. Spanish National State*, 116 F.2d 43, 45 (2d Cir. 1940), cert. denied, 314 U.S. 627 (1941); *Accord, Banco Nacional de Cuba v. Steckel*, 134 So.2d 23, 24 (Fla. App. 1961).

35. 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943).

36. 324 U.S. 30, 65 S.Ct. 530, 89 L.Ed. 729 (1945).

37. The State Department would make a determination only at the request of an authorized representative of the sovereign government. It would not respond to requests from private parties to announce its position with respect to a claim to immunity which the foreign sovereign had not brought to the Department's attention. Letter from Assistant Legal Adviser Yingling to Leo M. Drachsler, January 15, 1962, 6 *Whiteman*, *supra* note 9, at 691-92. The Department had also refused to take action on a request by a foreign sovereign that could be mooted by a favorable court ruling on a pending motion to dismiss based on other grounds. Letter from Assistant Legal Adviser Yingling to Benjamin A. Matthews, May 12, 1961, *id.*

38. Letter from the Office of the Legal Adviser, February 9, 1970, in 64 *Am. J. Int'l L.* 650 (1970). Informal conferences with the parties prior to State Department determinations of claims to immunity were initiated by Professor Abram Chayes during his term of office as Legal Adviser from 1961 to 1964 (Letter from John A. Boyd, Attorney-Adviser, Office of the Legal Adviser, to the author, March 11, 1975), apparently in response to criticism of the Department's earlier practice of deciding claims on the basis of ex parte communication by the foreign sovereign. *See, e.g.,* Cardozo, "Sovereign Immunity: The Plaintiff Deserves a Day in Court," 67 *Harv. L. Rev.* 608 (1954).

39. Letter from the Legal Adviser, quoted in *Spacil v. Crowe*, 489 F.2d 614, 616 (5th Cir. 1974).

40. *Ex parte* Republic of Peru, 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943); *Miller v. Ferrocarril Del Pacifico de Nicaragua*, 137 Me. 251, 18 A.2d 688, 691-92 (1941); *United States of Mexico v. Schmuck*, 293 N.Y. 264, 56 N.E.2d 577, 580 (1944), aff'd on rehearing, 294 N.Y. 265, 62 N.E.2d 64 (1945); *Chemical Natural Resources, Inc. v. Republic of Venezuela*, 420 Pa. 134, 215 A.2d 864, 867, cert. denied, 385 U.S. 802 (1966). *See* *Restatement (Second) § 72(1)* (1965).

41. *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1199-1220 (2d Cir.), cert. denied, 404 U.S. 985 (1971); *Flota Maritima Browning de Cuba, S.A. v. M.V. Ciudad de la Habana*, 335 F.2d 619, 625 (4th Cir. 1964); *Rich v.*

Naviera Vacuba, S.A., 295 F.2d 24, 26 (4th Cir. 1961); Miller v. Ferrocarril Del Pacifico de Nicaragua, 137 Me. 251, 18 A.2d 688, 692 (1941).

42. Southeastern Leasing Corp. v. Stern Dragger Belogorsk, 493 F.2d 1223, 1224 (1st Cir. 1974). See Lowenfeld, *supra* note 3, at 416 n.160. But see Stephen v. Zivnostenska Banka, National Corp., 15 A.D.2d 111, 222 N.Y.S.2d 128, 138 (1961), *aff'd*, 12 N.Y.2d 781, 235 N.Y.S.2d 1 (1962), in which the court tried title to attached assets prior to entertaining a claim to immunity despite a State Department suggestion.

43. The Janko (The Norsktank), 54 F. Supp. 240, 241 (E.D.N.Y. 1944).

44. Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1200-01 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971); Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710, 724 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961).

45. 324 U.S. 30, 65 S.Ct. 530, 89 L.Ed. 729 (1945).

46. Renchard v. Humphreys & Harding, Inc., 381 F. Supp. 382, 384 (D.D.C. 1974); Amkor Corp. v. Bank of Korea, 298 F. Supp. 143, 144 (S.D.N.Y. 1969). Accord, French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 51, 295 N.Y.S.2d 433, 439, 242 N.E.2d 704 (1968).

47. Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); Ocean Transport Co. v. Government of the Republic of the Ivory Coast, 269 F. Supp. 703, 705 (E.D. La. 1967); Gonzalez v. Industrial Bank (of Cuba), 33 Misc. 2d 283, 227 N.Y.S.2d 456, 458 (Sup. Ct. 1961), *rev'd on other grounds*, 16 A.D.2d 347, 228 N.Y.S.2d 81 (1962). Cf. National City Bank v. Republic of China, 348 U.S. 356, 360-61, 75 S.Ct. 423, 99 L.Ed. 389 (1955).

48. *In re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298, 319-20 (D.D.C. 1960).

49. Hungarian People's Republic v. Cecil Associates, 118 F. Supp. 954, 957 (S.D.N.Y. 1953). The Department of State, in response to an inquiry from the court, stated that it would not recognize and allow immunity of the Hungarian Republic to a counterclaim for damages brought by the lessor of its New York consulate to an action initiated by Hungary to recover its security deposit after the United States ordered its New York consulate closed in retaliation for Hungary's detention of four U.S. servicemen. The court, however, held that the letter was not conclusive and denied immunity only to the extent of a set-off.

50. See Sullivan v. State of Sao Paulo, 36 F. Supp. 503, 504 n.1 (E.D.N.Y.), *aff'd*, 122 F.2d 355 (2d Cir. 1941); The Maliakos, 41 F. Supp. 697, 698 (S.D.N.Y. 1941); The Ioannis P. Goulandris, 40 F. Supp. 924 (S.D.N.Y. 1941).

51. *Sullivan v. State of Sao Paulo*, 36 F. Supp. 503, 505-06 (E.D.N.Y.), aff'd, 122 F.2d 355 (2d Cir. 1941). If the State Department's acceptance of facts were not strongly worded, however, the Court might fail to recognize it as a formal acceptance and may make an independent finding of facts. *The Ioannis P. Goulandris*, 39 F. Supp. 632, 632-33 (S.D.N.Y.), modified, 40 F. Supp. 924 (S.D.N.Y. 1941). If later communications from the Department established that it was the Department's view that immunity should be granted, the court might treat the Department's decision as a formally binding recognition of the claim. *Sullivan v. State of Sao Paulo*, supra, 122 F.2d at 357.

52. See *The Attualita*, 238 F. 909, 910 (4th Cir. 1916). But see note 58 infra.

53. See, e.g., *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 71, 58 S.Ct. 432, 82 L.Ed. 667 (1938); *Flota Maritima Browning de Cuba, S.A. v. M.V. Ciudad de la Habana*, 335 F.2d 619, 623 (4th Cir. 1964).

54. *The Pesaro*, 227 F. 473, 479 (S.D.N.Y. 1921). Cf. *National City Bank v. Republic of China*, 348 U.S. 356, 360-61, 75 S.Ct. 423, 99 L.Ed. 389 (1955).

55. *Flota Maritima Browning de Cuba, S.A. v. M.V. Ciudad de la Habana*, 335 F.2d 619, 623 (4th Cir. 1964).

56. E.g., *Heaney v. Government of Spain*, 445 F.2d 501 (2d Cir. 1971); *Anaconda Co. v. Corporacion del Cobre*, 55 F.R.D. 16, 18 (S.D.N.Y. 1972).

57. In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist. That is to say, it is for them to decide whether the vessel when seized was that of a foreign government and was of a character and operated under conditions entitling it to the immunity in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations.

Republic of Mexico v. Hoffman, 324 U.S. 30, 34-35, 65 S.Ct. 530, 89 L.Ed. 729 (1945).

58. The State Department recently ended its practice of relaying claims for immunity to the courts without comment because the courts made inconsistent inferences from the practice. See Lowenfeld, "Claims Against Foreign States--A Proposal for Reform of United States Law," 44 *N.Y.U. L. Rev.* 901, 911 n.30 (1969) [hereinafter cited as Lowenfeld, "Claims"]; Bilder, "The Office of the Legal Adviser: The State Department

Lawyer and Foreign Affairs," 56 Am. J. Int'l L. 633, 675 n.92 (1962) [hereinafter cited as Bilder].

59. Ex parte Muir, 254 U.S. 522, 532, 41 S.Ct. 187, 65 L.Ed. 383 (1921). A consul of the foreign sovereign "is not competent, merely by virtue of his office," to make the claim. The Sao Vicente, 260 U.S. 151, 43 S.Ct. 15, 67 L.Ed. 179 (1922). Nor is the master of a libeled government ship competent. The "Guy Djemal", 264 U.S. 90, 95, 44 S.Ct. 244, 68 L.Ed. 574 (1924). Nor is a government corporation. Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, 300 F. 891, 892-94 (S.D.N.Y. 1924), rev'd in part on other grounds, 20 F.2d 307 (2d Cir.), cert. denied, 275 U.S. 497 (1927). But cf. Loomis v. Rogers, 254 F.2d 941, 944 (D.C. Cir. 1958), cert. denied, 359 U.S. 928 (1959), in which the court held that, where there is no question as to the ownership of attached property, a formal suggestion of immunity by the foreign state is not required.

60. Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68, 75-76, 58 S.Ct. 432, 82 L.Ed. 667 (1938); Pan American Tankers Corp. v. Republic of Vietnam, 291 F. Supp. 49, 52 (S.D.N.Y. 1968). But see Puente v. Spanish National State, 116 F.2d 43, 45 (2d Cir. 1940), cert. denied, 314 U.S. 627 (1941), in which the court required the plaintiff to establish a lack of immunity where the court had not yet obtained jurisdiction over property sought to be attached in in rem proceedings, and In re Grand Jury Investigation of the Shipping Industry, 186 F. Supp. 298, 319-20 (D.D.C. 1960), in which the court required the Justice Department, as prosecutor, to prove facts showing a lack of immunity from subpoenas, despite a State Department denial of immunity.

61. Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68, 75-76, 58 S.Ct. 432, 82 L.Ed. 667 (1938); Pan American Tankers Corp. v. Republic of Vietnam, 291 F. Supp. 49, 52 (S.D.N.Y. 1968); The Ljubica Matkovic, 49 F. Supp. 936, 939-40 (S.D.N.Y. 1943); The Ioannis P. Goulandris, 39 F. Supp. 632, 633 (S.D.N.Y.), modified, 40 F. Supp. 924 (S.D.N.Y. 1941). The suggestion itself was not considered prima facie evidence of the facts represented, Ex parte Muir, 254 U.S. 522, 532, 41 S. Ct. 187, 65 L.Ed. 383 (1921), unless in the form of a sworn affidavit by one with knowledge, The Frederick, 43 F. Supp. 1015 (E.D.N.Y. 1942).

62. Sec. 4(a), 90 Stat. 2892, 28 U.S.C. § 1602 (1976).

63. Letter to the Speaker of the House of Representatives from Richard G. Kleindienst, Attorney General, and William P. Rogers, Secretary of State, January 16, 1973, in "Hearing," supra note 4, at 34; see also Report, supra note 4, at 45.

63a. See 28 U.S.C. § 1331.

64. Sec. 4(a), 90 Stat. 2892, 28 U.S.C. §§ 1604-05, 1607,

1609-11 (1976). Newly enacted 28 U.S.C. §§ 1604 and 1609 establish, as a general rule, immunity from suit and immunity from attachment and execution, respectively. Newly enacted 28 U.S.C. §§ 1605 and 1610 establish exceptions to the general rule.

65. "Hearing," supra note 4, at 40.

65-1. Report, supra note 4, at 17.

65a. The Foreign Sovereign Immunities Act of 1976 enacts a new section of Title 28 creating original jurisdiction in the federal district courts to hear actions against foreign states and amends the section creating diversity jurisdiction to exclude such actions. Secs. 2 and 3, 90 Stat. 2891, 28 U.S.C. §§ 1330 and 1332(a) (1976). The new jurisdictional section reads, in part, as follows:

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title [see note 177 infra] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1907 of this title or under any applicable international agreement.

28 U.S.C. § 1330.

65b. F.R. Civ. P. Rule 8(a); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); 1 Moore's Federal Practice ¶10.60[4] at 609. Congress has power to alter this allocation of the burden of proving statutory jurisdictional facts, but not facts establishing Article III jurisdiction. U.S. Const. art. III, § 1; *Sheldon v. Sill*, 49 U.S. (8 How.) 440, 12 L.Ed. 1147 (1850); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). Because any suit brought by an American citizen against a foreign state, subdivision or instrumentality is within the Article III jurisdiction of the federal judiciary, Congress has power to impose the burden of proving immunity even in actions brought under newly enacted 28 U.S.C. § 1330. However, notwithstanding the House Judiciary Committee's interpretation of the legislation, Congress has not clearly done so. See Report, supra note 4, at 17.

65c. F.R. Civ. P. Rule 12(h)(3); *Mansfield, Coldwater & Lake, Michigan Ry v. Swan*, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884); *Louisville & Nashville Ry v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908).

65d. 90 Stat. 2891, 28 U.S.C. §§ 1330, 1332(a)(2), (3) and (4), 1391(f), 1441(d), 1602 et seq. (1976). The legislation is effective 90 days after enactment. See note 4 supra.

66. In the letter of transmission accompanying the administration's draft of an earlier version of the bill enacted as the Foreign Sovereign Immunities Act of 1976, Secretary of State Rogers noted the importance of "assuring that the law and practice of this and other countries conform with international law" and revealed that "[i]n the process of ascertaining and applying the law, both the Department and the courts rely on precedents and trends of decision in foreign as well as United States courts." Letter from Attorney General Kleindienst and Secretary of State Rogers to the Speaker of the House, January 16, 1973, in "Hearing," supra note 4, at 33-35. On other occasions the Department has made more explicit its reliance on international law. See text accompanying note 132 infra.

67. Since The Paquete Habana, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900), it has been firmly established that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." See also Skiriotes v. Florida, 313 U.S. 69, 72-73, 61 S.Ct. 924, 85 L.Ed. 1193, rehearing denied, 313 U.S. 599 (1941); District of Columbia v. International Distributing Corporation, 331 F.2d 817, 820, 118 U.S. App. D.C. 71 (1964); Dickinson, "The Law of Nations as Part of the National Law of the United States," 101 U. Pa. L. Rev. 26, 792 (1952). International law is enforceable in American courts whether based on treaty or custom. See U.S. Const. art. III, § 2, cl. 1; art. VI, cl. 2 (treaties); The Paquete Habana, supra (customary law). It is equally binding on state courts. See Skiriotes v. Florida, supra, 313 U.S. at 72-73 ("International law is a part of our law and as such is the law of all States of the Union."); Republic of Argentina v. City of New York, 25 N.Y.2d 252, 250 N.E.2d 698, 303 N.Y.S. 2d 644, 647-48 (1969) (customary international law prohibits real property taxes on consulate); Note, "Federal Common Law and Article III: A Jurisdictional Approach to Erie," 74 Yale L. J. 325, 335-37 (1964). It is well established that Congress can enact legislation that is expressly contrary to international law, yet binding upon the courts, The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620-21, 20 L.Ed. 227 (1870); The Head Money Cases, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798 (1884); The Chinese Exclusion Case, 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068 (1889); Tag v. Rogers, 267 F.2d 664 (D.C. Cir. 1959), though by an ancient doctrine of construction "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." The Charming Betsy, 6 U.S. (2 Cranch) 65, 118 (1804); Lauritzen v. Larsen, 345 U.S. 571, 578, 73 S.Ct. 921, 97 L.Ed. 1254 (1953).

It is open to debate, however, whether executive department policy is superior in authority to international law when department policy has not been embodied in a bilateral executive agreement made pursuant to Congressional authority, see *Star-Kist Foods, Inc. v. United States*, 275 F.2d 472 (3rd Cir. 1959), although the executive department's extensive plenary powers in matters relating to foreign relations has been recognized, see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936). See generally L. Henkin, Foreign Affairs and the Constitution 221-22 (1972).

67a. The codification makes its standards subject only to international agreements signed by the United States before the codification's enactment:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2892, 28 U.S.C. § 1604 (1976).

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment [,] arrest and execution except as provided in sections 1610 and 1611 of this chapter.

Id., 28 U.S.C. § 1609. Limitation of the codification's deference to international agreements which the United States has already joined seems to prevent it from being superseded by a future international agreement executed by the Executive alone, but not by a future treaty, since treaties and legislation are of equal dignity, the later in time controlling. See note 67 *supra*. However, an executive agreement limiting a foreign sovereign's immunity more than the act would be effective as a waiver. See text at notes 200-04 *infra*.

68. H.R. 3496, 93rd Cong., 1st Sess., Sec. 1 (1973).

69. *Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2892, 28 U.S.C. § 1602 (1976).*

70. Unless the State Department was the forum to which the claim was being made, current State Department policy was usually unknown to the decision-maker under prior law. The State Department did not compile and promulgate its standards of decision. Most of its ad hoc determinations were made

without an accompanying statement of reasons. The Department did not even keep a current, publicly available file of its determinations. Therefore, when a court was called on to apply State Department policy without the benefit of communications from the Department, it looked to the few published statements of Department policy and to whatever reports of recent ad hoc determinations it could find. This paper examines the same sources.

71. Earlier in this century, the State Department had consistently opposed extending sovereign immunity to the commercial acts of states. See United States v. Deutsche Kalisyndikat Gesellschaft, 31 F.2d 199, 200 (S.D.N.Y. 1929); The Pesaro, 277 F. 473, 479-80 n.3 (S.D.N.Y. 1921). However, when that issue was argued before the Supreme Court in Berizzi Brothers Co. v. S.S. Pesaro, 271 U.S. 562, 46 S.Ct. 611, 70 L.Ed. 1088 (1926) (see note 85 *infra*), the Justice Department, which is responsible for defending actions against the United States in foreign countries, disagreed with the State Department position and refused to transmit State Department views to the Court. See 2 Hackworth, Digest of International Law 430 (1941); Lowenfeld, "Claims," *supra* note 58, at 904 (1969); Note, "The Statutory Proposal to Regulate the Jurisdictional Immunities of Foreign States," 6 Vand. J. Transnat'l L. 549, 554 n.16 (1973). After Berizzi Brothers, perhaps out of deference to the Court, the Department made suggestions of immunity for commercial activities. See Cardozo, "Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?," 48 Cornell L. Q. 461, 472 (1963) [hereinafter cited as Cardozo]. The decision in Republic of Mexico v. Hoffman, 324 U.S. 30, 65 S.Ct. 530, 89 L.Ed. 729 (1945) (see text accompanying notes 24 and 25 *supra*), and the growth of state trading activities and world trade in general gave the Department occasion to re-evaluate its position.

72. 26 Dept. State Bull. 984 (1952).

73. *Id.*

74. See Ocean Transport Co. v. Government of the Republic of the Ivory Coast, 269 F. Supp. 703, 704 n.1 (E.D. La. 1967); Amkor Corp. v. Bank of Korea, 298 F. Supp. 143, 144 (S.D.N.Y. 1969). In Amkor the Bank of Korea, an instrumentality of the Republic of Korea acting on its behalf, had solicited and accepted a bid by the plaintiff to sell machinery and equipment to a private corporation for use in a caustic soda plant. The sale was solicited pursuant to an agreement between the Republic of Korea and the United States. When the agreement was cancelled by the Director of the International Cooperation Administration, the buyer repudiated the contract. The plain-

tiff brought suit against the Bank of Korea. In denying the Korean Ambassador's request for State Department recognition and allowance of the Bank's claim to immunity, the Department discussed the restrictive theory:

In considering requests for suggestions of sovereign immunity, the Department of State applies the "restrictive theory" of sovereign immunity as announced in the Tate letter of May 19, 1952. Under that theory the immunity of the sovereign is suggested with respect to governmental or public acts of a State but not with regard to private or commercial acts.

The Republic of Korea has urged that the Bank of Korea, as a governmentally authorized agent acting without profit to itself on behalf of the Republic of Korea pursuant to an agreement between the Government of the United States and the Republic of Korea, was engaged in public acts within the meaning of the Tate letter and is therefore immune from suit.

The Department of State regrets that it cannot agree with this conclusion. The essence of the transaction, as alleged, is a simple contract for the purchase of commercial articles on behalf of a commercial enterprise. The fact that the Bank of Korea was acting pursuant to an agreement between the Government of the United States and the Government of the Republic of Korea, or that it is an official arm of the Republic of Korea, does not alter the commercial nature of the transaction. The policy expressed in the Tate letter focuses on the nature of the transaction and not upon the character of the government agency involved or upon its reasons for engaging in a transaction. The allegation that this agency has undertaken a commercial activity is dispositive. The Department of State, therefore, finds it necessary to decline the request of the Government of the Republic of Korea that a suggestion of sovereign immunity be made.

Id. at 144.

75. See In re Grand Jury Investigation of the Shipping Industry, 186 F. Supp. 298, 318 (D.D.C. 1960).

76. See Renchar v. Humphreys & Harding, Inc., 381

F. Supp. 382 (D.D.C. 1974) (damage to neighboring property inflicted during construction of the Brazilian Embassy); *Hungarian People's Republic v. Cecil Associates*, 118 F. Supp. 954 (S.D.N.Y. 1953) (failure to pay rent for leased consulate after the United States ordered closing of consulate).

77. See *Mirabella v. Banco Industrial de la Republica Argentina*, 38 Misc. 2d 128, 237 N.Y.S.2d 499, 501 (Sup. Ct. 1963).

78. See *Amkor Corp. v. Bank of Korea*, 298 F. Supp. 143 (S.D.N.Y. 1969) (solicitation and acceptance of commercial bids for private enterprise pursuant to an international development agreement).

79. See *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 51, 242 N.E.2d 704, 295 N.Y.S.2d 433, 439 (1968) (failure to make payments in dollars pursuant to an investment contract after the Cuban government imposed foreign exchange controls forbidding the exportation of dollars).

80. See *Stephen v. Zivnostenska Banka, National Corp.*, 15 A.D.2d 111, 222 N.Y.S.2d 128 (1961), *aff'd*, 12 N.Y.2d 781, 235 N.Y.S. 2d 1 (1962) (refusal of nationalized bank to pay depositors).

81. Compare *Ocean Transport Co. v. Government of the Republic of the Ivory Coast*, 269 F. Supp. 703 (E.D. La. 1967); *Petrol Shipping Corporation v. Kingdom of Greece, Ministry of Commerce, Purchase Directorate*, 360 F.2d 103 (2d Cir. 1966); and *New York and Cuba Mail Steamship Co. v. Republic of Korea*, 132 F. Supp. 684 (S.D.N.Y. 1955), with *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971).

In *Ocean Transport* the Ivory Coast engaged the plaintiff to sail a tuna and sardine fishing vessel, purchased from the United States with A.I.D. funds to serve as a training ship for Ivory Coast fishermen, from Louisiana to the Ivory Coast, guaranteeing the vessel's seaworthiness and agreeing to pay the plaintiff \$215 per day for delay. When the plaintiff had to put in to Key West because of the ship's unseaworthiness, it sued on its contract. In *Petrol Shipping* an agency of the Greek government chartered the plaintiff's ship to transport grain purchased from the United States government from Texas to Piraeus. At Piraeus, the agency designated an unsafe birth and the ship sustained hull damage. In *New York and Cuba Mail Steamship Co.* Korea had chartered plaintiff's vessel to transport rice to Pusan for free distribution to civilians and soldiers during the Korean War. At Pusan, the plaintiff's vessel sustained damage in a collision with one of Korea's lighters. In all three cases, the State Department declined to recognize the defendant's claim to immunity, ruling

that the activities in question were private acts.

In Isbrandtsen Tankers India chartered the plaintiff's vessels to transport grain from the United States to Calcutta. The Indian government scheduled so many arrivals at the same time that the lightening vessels had to wait for some time in the Bay of Bengal before proceeding up the Hooghly River to their destination. The plaintiff filed an action for demurrage. As to this charge, the Department recognized India's claim to immunity.

82. The classic case is not entirely academic. In Kingdom of Roumania v. Guaranty Trust Co., 250 F. 341 (2d Cir.), cert. denied, 246 U.S. 663 (1918), the issue was whether Roumania was immune from a counterclaim for breach of a contract to purchase shoes for its army.

83. Prior to the passage of the Foreign Sovereign Immunities Act of 1976, the State Department seemed to view such activities as private acts. See note 30 supra.

84. Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).

85. A Supreme Court case to the contrary, Berizzi Brothers Co. v. S.S. Pesaro, 271 U.S. 562, 46 S.Ct. 611, 70 L.Ed. 1088 (1926), has never been formally overruled, however. In that case, the issue was whether a vessel owned and operated by the Italian government for the carriage of merchandise for hire was immune from the admiralty jurisdiction of federal courts to the same extent as a warship. The opinion in The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812), had expressly reserved decision on whether "the private property of the person who happens to be a prince" is immune from suit. Before Berizzi Brothers, the question was "an open one and of uncertain solution." Ex parte Hussein Lutfi Bey, 256 U.S. 616, 619, 41 S.Ct. 609, 65 L.Ed. 1122 (1921). Compare The Gul Djemal, 296 F. 567 (S.D.N.Y. 1922), aff'd, 264 U.S. 90, 44 S.Ct. 244, 68 L.Ed. 574 (1924), and The Pesaro, 277 F. 473 (S.D.N.Y. 1921), with The Carlo Poma, 259 F. 369 (2d Cir. 1919), vacated, 255 U.S. 219 (1921); The Maipo, 252 F. 627 (S.D.N.Y. 1918); and The Pampa, 245 F. 137 (E.D.N.Y. 1917). Berizzi Brothers settled the question in favor of immunity. The Court stated:

We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no

international usage which regards the maintenance and advancement of the economic welfare of a people in a time of peace as any less a public purpose than the maintenance and training of a naval force.

Supra, 271 U.S. at 574.

Although *Republic of Mexico v. Hoffman*, 324 U.S. 30, 65 S.Ct. 530, 89 L.Ed. 729 (1945) (see pp. 22-24 supra), did not formally overrule *Berizzi Brothers*, its reasoning, when added to the State Department's adoption of the restrictive theory, made *Berizzi Brothers* no longer good law. Lower courts have expressly so held. *Flota Maritima Browning de Cuba, S.A. v. M.V. Ciudad de la Habana*, 335 F.2d 619, 624 n.10 (4th Cir. 1964); *Renhard v. Humphreys & Harding, Inc.*, 38 F. Supp. 382, 384 (D.D.C. 1974); *Pacific Molasses Co. v. Comité de Ventas de Miel de la Republica Dominicana*, 30 Misc. 2d 560, 219 N.Y.S.2d 1018, 1019 (Sup. Ct. 1961). In *National City Bank v. Republic of China*, 348 U.S. 356, 360-61, 75 S.Ct. 423, 99 L.Ed. 389 (1955), the court mentioned without disapproval the State Department's restrictive theory in support of its decision:

More immediately touching the evolution of legal doctrine regarding a foreign sovereign's immunity is the restrictive theory that our State Department has taken toward the claim of such immunity. As the responsible agency for the conduct of foreign affairs, the State Department is the normal means for suggesting to the courts that a sovereign be granted immunity from a particular suit. . . . Its failure or refusal to suggest such immunity has been accorded great weight by this Court.

. . . And this for the reason that a major consideration for the role enunciated in *The Schooner Exchange* is the embarrassing consequences which judicial rejection of a claim of sovereign immunity may have on diplomatic relations. Recently the State Department has pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government, 26 Dept. State Bull. 984 (1952), despite the fact that this Court thirty years earlier rejected the weighty opinion of Judge Mack in *The Pesaro*, 277 F. 473 (see, also, his opinion in *The Gloria*, 286 F. 188), for dif-

ferentiating between commercial and war vessels of governments. Berizzi Bros. Co. v. Steamship Pesaro, 271 U.S. 562.

Subsequently, the Court denied a petition for certiorari in Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965), a case which declined foreign state immunity on the basis of the restrictive theory. But see the remarks of Justices Douglas and Black, dissenting from dismissal of an appeal, in Iannou v. New York, 371 U.S. 30, 31-32, 83 S.Ct. 6, 9 L.Ed. 2d 5 (1962):

[A] foreign country is immune from suit for injuries caused in its commercial transactions (Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562), even though this result is not required by international law (Restatement, Foreign Relations Law of the United States, proposed official draft, 1962, § 72). But, if the Executive Department of the Federal Government indicates its views on whether immunity should be allowed, those views will control. Republic of Mexico v. Hoffman, 324 U.S. 30.

86. Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965). See Restatement (Second) § 69 (1965), which requires that the commercial activity occur outside the foreign sovereign's territory, however.

87. 324 U.S. 30, 65 S.Ct. 530, 89 L.Ed. 729 (1945).

88. E.g., Heaney v. Government of Spain, 445 F.2d 501, 503 (2d Cir. 1971); Aerotrade, Inc. v. Republic of Haiti, 376 F. Supp. 1281, 1283-84 (S.D.N.Y. 1974); American Hawaiian Ventures, Inc. v. M.V.J. Latuharhary, 257 F. Supp. 622, 626 (D.N.J. 1966).

89. Amkor Corp. v. Bank of Korea, 298 F. Supp. 143 (S.D.N.Y. 1969) (solicitation and acceptance of commercial bids for private enterprise pursuant to an international development agreement); Pan American Tankers Corp. v. Republic of Vietnam, 291 F. Supp. 49 (S.D.N.Y. 1968) (acceptance of bids, execution of bonds and negotiations with sellers in order to supervise expenditures of foreign currency on behalf of the government).

90. Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965) (charter of ship to transport surplus wheat from the United States to Spanish ports, resulting in delay and hull damage).

91. *ADM Milling Co. v. Republic of Bolivia*, No. 75-946 (D.D.C. 1975), in 14 Int'l Legal Materials 1279 (1975) (contract to sell wheat to Bolivian ministry); *Three Stars Trading Co. v. Republic of Cuba*, 32 Misc. 2d 4, 222 N.Y.S.2d 675 (Sup. Ct. 1961) (sale by Cuban Department of Fisheries of frozen shrimp); *Pacific Molasses Co. v. Comité de Ventas de Miel de la República Dominicana*, 30 Misc. 2d 560, 219 N.Y.S.2d 1018 (Sup. Ct. 1961) (sale by business agency of Dominican Republic of molasses).

92. *Lan-Chile Airlines, Inc. v. Rodriguez*, 296 So.2d 498 (Fla. App. 1974), cert. denied, 310 So.2d 305 (1975) (beating of plaintiff by Chilean government airline's agents in airport lounge).

93. *Republic of Iraq v. First National City Trust Co.*, 207 F. Supp. 588, 590 (S.D.N.Y. 1962), appeal dismissed, 313 F.2d 194 (2d Cir. 1963).

94. *American Hawaiian Ventures, Inc. v. M.V.J. Latuhary*, 257 F. Supp. 622 (D.N.J. 1966) (confiscation of rubber plantations by the Republic of Indonesia).

95. *Compare Ocean Transport v. Government of the Republic of the Ivory Coast*, 269 F. Supp. 703 (E.D. La. 1967) (contract to transport a training vessel purchased with A.I.D. funds is private act); *Harris & Co. Advertising, Inc. v. Republic of Cuba*, 127 So.2d 687 (Fla. App. 1961) (contract to promote Cuban tourism through advertising campaign is private act); and *Et Ve Balik Kurumu v. B.N.S. International Sales Corp.*, 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960), aff'd, 17 A.D.2d 927, 233 N.Y.S.2d 1013 (1962) (contract to purchase mutton for use by the Turkish army); with *Heaney v. Government of Spain*, 445 F.2d 501 (2d Cir. 1971) (contract with American lawyer to publicize British violation of the human rights of Irish citizens in attempt to support the defendant's claim to Gibraltar is a public act); *Aerotrade, Inc. v. Republic of Haiti*, 376 F. Supp. 1281 (S.D.N.Y. 1974) (contract for purchase of military equipment is a public act); and *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining & Distribution of Petroleum*, 13 F.R.D. 280 (D.D.C. 1952) (formation and operation of a private oil company for the purpose of guaranteeing the oil supply of the British fleet is a public act).

96. See text at notes 113 and 114 infra.

97. See note 67 supra.

98. *Convention on the Territorial Sea and the Contiguous Zone*, adopted April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. See note 108 infra.

99. See note 67a supra.

99a. *Foreign Sovereign Immunities Act of 1976*, Sec. 4(a), 90 Stat. 2892, 28 U.S.C. § 1605 (1976).

100. *Id.*, 28 U.S.C. § 1603. Under the act, if an activity is customarily conducted for profit its commercial nature can "readily be assumed," while a single contract would be a "particular commercial transaction" if of the same character as a contract which might be made by a private person." *Report, supra* note 4, at 16. This test is easier to state than to apply, however. For example, according to the House Judiciary Committee, a foreign state's contract to purchase arms for its army is a commercial act because the public purpose of that act is irrelevant, but the employment of government personnel by the foreign state is not a commercial act (unless the personnel are American or third country nationals employed in the United States). *Id.* Because of the test's subtleties, pre-codification precedent will be crucial in evaluating the commercial or noncommercial nature of a foreign state's acts.

The codification, as enacted, provides an additional relevant definition:

For the purposes of this chapter a --

* * *

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2892, 28 U.S.C. § 1603 (1976). The House Judiciary Committee has stated that the definition "is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff." *Report, supra* note 4, at 17.

101. See *Restatement (Second)* §§ 7(2), 10 and 20 (1965); but see note 131 *infra*.

102. S. Sucharitkul, *State Immunities and Trading Activities in International Law* 12, 19 (1959) [hereinafter cited as *Sucharitkul*]; J. Sweeney, *The International Law of Sovereign Immunity* 20 (1963) [hereinafter cited as *Sweeney*]. The latter work is a general survey of the international law of foreign state immunity commissioned by the Bureau of Intelligence and Research of the U.S. Department of State. In describing current international law, this author has relied upon Professor Sweeney's work for pre-1963 developments and updated it with independent research.

103. Article 38 of the Statute of the International Court of Justice directs the I.C.J. to look to the following sources in ascertaining international law:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

59 Stat. 1055, T.I.A.S. No. 993. Justice Gray in *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900), suggested a similar list of sources for the search for international law. This paper examines the same sources. The constant object of the examination is to determine what shared expectations of authority are held by the effective elites of the world community on the topic of foreign state immunity.

104. Sweeney, supra note 102, at 26-41; *Collision with Foreign Government-Owned Motor Car (Austria) Case*, 84 J.B. 43, 40 I.L.R. 73 (Austria, Sup. Ct. 1961) (driving car with mail to American Embassy is not sovereign act; no immunity); *Societe Anonyme "Dhellemes et Masurel" v. Banque Centrale de la Republique de Turquie*, 45 I.L.R. 85 (Belgium, Brussels Ct. of App. 1963) (contract of state bank to pay seller of goods to Turkish importer not sovereign act; no immunity); *Chaussois v. La Tabacoop de Bone*, 13 A.F.D.I. 848 (1967), 47 Int'l L. Rep. 152 (France, Paris Ct. of App. 1966) (employment contract of state-owned agricultural cooperative is not public act; no immunity); *Societe Bauer-Marchal et Cie v. Gouvernement Turc*, 69 R.G.D.I.P. 1161 [1965], 47 I.L.R. 155 (France, Rouen Ct. of App. 1965) (state's guarantee of city's bonds is private act; no immunity); *Claim against the Empire of Iran Case*, 16 Ent. Bund. 27, 45 I.L.R. 57 (Federal Republic of Germany, Fed. Const. Ct. 1963) (execution of concession agreement by state oil company is private act; no immunity); *Societe Europeene D'Etudes et D'Enterprises v. Yugoslavia* (Netherlands, High Council 1973), in 14 Int'l Legal Materials 71 (1975) (execution of contract for construction of railroad is private act; no immunity from enforcement of international arbitration award); *Republic Arabe Unie c. Dame X*, 86 Ent. Schweiz. Bund. 23 (Switzerland, Sup. Ct. 1960), in 55 Am. J. Int'l L. 167 (1961) (lease of house for diplomatic purpose is private act; no immunity). Sucharitkul, supra note 102, at 88 adds the countries of Scandinavia to this group on the basis of scanty evidence.

105. Sweeney, supra note 102, at 38-41; *United Arab Republic v. Mirza Ali*, [1962] A.I.R. 389 (Calcutta High Ct., App. Div. 1962), in 2 Int'l Legal Materials 646 (1962), 57 Am. J.

Int'l L. 939 (1963). But cf. Flota Maritima Browning de Cuba S.A. v. The Steamship Canadian Conqueror, [1962] Can. Sup. Ct. 598, 34 D.L.R.2d 628, 42 I.L.R. 125 (1962) (expressing doubt as to absolute view); Sucharitkul, supra note 102, at 132, 181 (law of England is unsettled). Law of the Union of Soviet Socialist Republics No. 526, supra note 9, enacts the absolute rule of immunity conditioned on reciprocal treatment by the foreign state. The Eastern European Communist nations are expected to follow a similar rule, see, e.g., French Consulate in Cracow Case, 3 O.S.P. 305, 26 I.L.R. 178 (Poland, Sup. Ct. 1958), though pre-Communist judicial authority in some of these nations followed the restrictive view of immunity, see Sucharitkul, supra note 102, at 148-50. It is instructive to note that the nations following the absolute rule are all present or former members of the British Commonwealth, following English case law, or Communist nations actively engaged in state trading.

106. See Sweeney, supra note 102, at 40-41; Nashashibi v. Consul-General of France in Jerusalem, 26 I.L.R. 190 (Jordan, Sup. Ct. of Cass. 1958); Ramiandrisoa v. French State, 40 I.L.R. 81 (Madagascar, Sup. Ct. 1965).

107. Adopted Apr. 10, 1926, 176 L.N.T.S. 199, 3 Hudson, International Legislation 1837. The Convention has been signed and ratified by Belgium, Brazil, Chile, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, the Netherlands, Norway, Poland, Portugal, Roumania, Sweden, Switzerland and Turkey. Poland has since denounced the Convention. Article 1 of the Convention subjects State-owned commercial vessels to the prescriptions of other nations:

Seagoing vessels owned and operated by States, cargoes owned by them, and cargoes and passengers carried on Government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes to the same rules of liability and to the same obligation as those applicable to private vessels, cargoes and equipment.

176 L.N.T.S. at 205. Article 2 subjects such states, vessels and cargoes to the jurisdiction of foreign courts for the purpose of applying these prescriptions:

For the enforcement of such liabilities and obligations there shall be the same rules concerning the jurisdiction of tribunals, the same legal actions, and the same procedure as in the case of privately owned merchant ves-

sels and cargoes and of their owners.

Id. at 206. Article 3 of the Convention exempted from Articles 1 and 2 and expressly extended jurisdictional immunity to ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by the State, and used at the time a cause of action arises exclusively on Governmental and non-commercial service.

Id. at 207.

108. Adopted Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. The Convention is adhered to by forty-four states. U.S. Department of State, Treaties in Force 373 (1975). Article 20 of the Convention provides, in part:

2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.

3. The provisions of the previous paragraph are without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

Article 21 provides that Article 20 "shall also apply to government ships operated for commercial purposes." Article 22 explains the extent to which the Convention's provisions affect the immunity of state vessels:

1. The rules contained in subsection A [relating to the right of innocent passage of all ships] and in article 18 [on charges] shall apply to government ships operated for non-commercial purposes.

2. With such exceptions as are contained in the provisions referred to in the preceding paragraph, nothing in these articles affects the immunities which such ships enjoy under these articles or other rules of international law.

The effect of Articles 22 and 21 is to subject ships in com-

mercial use to the provisions of Article 20 regardless of their state ownership.

109. Opened for signature November 29, 1969, in 64 Am. J. Int'l L. 481 (1970). Article IX of the Convention provides for damage actions in the forums of injured nations against polluters of its territorial seas. Article XI provides:

1. The provisions of this Convention shall not apply to warships or other ships owned or operated by a state and used, for the time being, only on government non-commercial service.

2. With respect to ships owned by a Contracting State and used for commercial purposes, each state shall be subject to suit in the jurisdictions set forth in Article IX and shall waive all defences based on its status as a sovereign state.

110. Opened for signature May 16, 1972, Council of Europe, European Treaty Series No. 74, in 11 Int'l Legal Materials 470 (1972), 66 Am. J. Int'l L. 932 (1972). The Convention has been signed by Austria, Belgium, the Federal Republic of Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom.

111. The relevant articles provide as follows:

ARTICLE 4

1. Subject to the provisions of Article 5, a Contracting State cannot claim immunity from the jurisdiction of the courts of another Contracting State if the proceedings relate to an obligation of the State, which, by virtue of a contract falls to be discharged in the territory of the State of the forum.

2. Paragraph 1 shall not apply:

(a) in the case of a contract concluded between States;

(b) if the parties to the contract have otherwise agreed in writing;

(c) if the State is party to a contract concluded on its territory and the obligation of the State is governed by its administrative law.

ARTICLE 5

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment

between the State and an individual where the work has to be performed on the territory of the State of the forum.

2. Paragraph 1 shall not apply where:

(a) the individual is a national of the employing State at the time when the proceedings are brought;

(b) at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually resident in that State; or

(c) the parties to the contract have otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter.

3. Where the work is done for an office, agency or other establishment referred to in Article 7, paragraphs 2(a) and (b) of the present Article apply only if, at the time the contract was entered into, the individual had his habitual residence in the Contracting State which employs him.

ARTICLE 6

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it participates with one or more private persons in a company, association or other legal entity having its seat, registered office or principal place of business on the territory of the State of the forum, and the proceedings concern the relationship, in matters arising out of that participation, between the State on the one hand and the entity or any other participant on the other hand.

2. Paragraph 1 shall not apply if it is otherwise agreed in writing.

ARTICLE 7

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial

activity, and the proceedings relate to that activity of the office, agency or establishment.

2. Paragraph 1 shall not apply if all the parties to the dispute are States, or if the parties have otherwise agreed in writing.

ARTICLE 8

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate:

(a) to a patent, industrial design, trade-mark, service mark or other similar right which, in the State of the forum, has been applied for, registered or deposited or is otherwise protected, and in respect of which the State is the applicant or owner;

(b) to an alleged infringement by it, in the territory of the State of the forum, of such a right belonging to a third person and protected in that State;

(c) to an alleged infringement by it, in the territory of the State of the forum, of copyright belonging to a third person and protected in that State;

(d) to the right to use a trade name in the State of the forum.

In addition, a signatory can, by making notification, exercise jurisdiction for acta jure gestionis not included within the above quoted articles if the act of the foreign state has a substantial relationship to the forum state. See Article 24 and Annex.

112. Sucharitkul, supra note 102, at 151-52; Note, "Sovereign Immunity--Waiver and Execution: Arguments From Continental Jurisprudence," 74 Yale L. J. 887, 913 (1964) [hereinafter cited as Note].

113. Treaty of Friendship, Commerce and Navigation with the Italian Republic, Feb. 2, 1948, art. XXIV, para. 6, 63 Stat. 2255 (1949), T.I.A.S. No. 1965; Treaty of Friendship, Commerce and Navigation with Uruguay, S. Exec. D., 81st Cong., 2d Sess., art. XVIII, para. 5 (1950); Treaty of Friendship, Commerce and Navigation with Ireland, Jan. 21, 1950, art. XX, para. 3, 1 U.S.T. 785, T.I.A.S. No. 2155; Treaty of Friendship, Commerce and Navigation with Greece, Aug. 3, 1951, art. XIV, para. 5, 5 U.S.T. 1829, T.I.A.S. No. 3057; Treaty of Friendship,

Commerce and Navigation with Columbia, art. XVIII, para. 2, S. Exec. M., 82d Cong., 1st Sess. (1951); Treaty of Friendship, Commerce and Navigation with Israel, Aug. 23, 1951, art. XVIII, para. 3, 5 U.S.T. 550, T.I.A.S. No. 2948; Treaty of Friendship, Commerce and Navigation with Denmark, art. XVIII, para. 3, S. Exec. I., 82d Cong., 2d Sess. (1951); Treaty of Friendship, Commerce and Navigation with Japan, April 2, 1953, art. XVIII, para. 2, 4 U.S.T. 2063, T.I.A.S. No. 2863; Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, Oct. 29, 1954, art. XVIII, para. 2, 7 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation with Haiti, art. XVIII, para. 2, S. Exec. H., 84th Cong., 1st Sess. (1955); Treaty of Amity, Economic Relations, and Consular Rights with Iran, Aug. 15, 1955, art. XI, para. 4, 8 U.S.T. 899, T.I.A.S. No. 3853; Treaty of Friendship, Commerce and Navigation with Nicaragua, art. XVIII, para. 3, S. Exec. G., 84th Cong., 2d Sess. (1956); Treaty of Friendship, Commerce and Navigation with the Republic of Korea, Nov. 28, 1956, art. XVIII, para. 2, 8 U.S.T. 2217, T.I.A.S. No. 3949; Treaty of Friendship, Commerce and Navigation with Kingdom of the Netherlands, Mar. 27, 1956, art. XVIII, para. 2, 8 U.S.T. 2043, T.I.A.S. No. 3942.

114. No enterprise of either High Contracting Party, including corporations, associations and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject therein.

Treaty of Friendship, Commerce and Navigation with Columbia, art. XVIII, para. 2, S. Exec. M., 82d Cong., 1st Sess. (1951). In 1958, the State Department discontinued this treaty practice at the request of the Attorney General because it made defense of suits against the United States abroad more difficult. Note, "The Statutory Proposal to Regulate the Jurisdictional Immunities of Foreign States," supra note 71, at 554 n.16. See Treaty of Friendship, Commerce and Navigation with Pakistan, Nov. 12, 1959, 12 U.S.T. 110, T.I.A.S. No. 4683, which does not include a waiver of immunity.

115. Art. 6, ¶12. See generally Starr, "A New Legal Framework for Trade Between the United States and the Soviet Union: the 1972 US-USSR Trade Agreement," 67 Am. J. Int'l L.

63 (1973). The Agreement was subsequently repudiated by the Soviet Union because of a Congressionally imposed American reservation concerning freedom of emigration from the Soviet Union.

116. See Sweeney, supra note 102, at 42; Sucharitkul, supra note 102, at 152.

117. See Report, supra note 4, at 9; 42 Op. Att'y Gen. No. 25, at 4-5, 8-9 (1960); Memo from Department of State to American Embassy, Manila, Sept. 15, 1961, in 6 Whiteman, supra note 9, at 610; Sucharitkul, supra note 102, at 99 and 331; Schmitthoff, "The Claim of Sovereign Immunity in the Law of International Trade," 7 Int'l & Comp. L. Q. 452 (1958) [hereinafter cited as Schmitthoff].

118. "Harvard Research in International Law Relating to the Competence of Courts in Regard to Foreign States," art. 11, in 26 Am. J. Int'l L. Supp. 451, 457 (1932).

119. Resolution on State Immunity, I.L.A. Rep. 45th Conf. vii, viii (1953).

120. Resolution on Immunity of Foreign States from Jurisdiction and Measures of Execution, Art. 5, May 30, 1954, 45-11 Annuaire 301, 302 (1954).

121. Resolution on Immunities of State-Owned Ships, 10 Int. A.B.A. Proc. 145, 146 (1957).

122. "Report on Rules Concerning the Immunity of State Ships" (1958), in 6 Whiteman, supra note 9, at 630.

123. "Final Report of the Committee on Immunity of States in respect of Commercial and other Transactions of a Private Character" (1960), in 6 Whiteman, supra note 9, at 572-74.

124. See, e.g., I. Brownlie, Principles of Public International Law 282 (1966) [hereinafter cited as Brownlie] which asserts that "[n]either the evidence of state practice nor the arguments from principle justify the replacement of the wider principle of immunity by some other principle." Rather there is "a presumption that the immunity of a state from the local jurisdiction stands except when there is a waiver." Soviet scholars likewise assert that the principle pars in parem non habet imperium, unrestricted by exceptions for commercial activities, is "a fundamental principle of the international rule of law." Lebedev, "Present Day Bourgeois Practice Regarding the Immunity of States from Foreign Jurisdiction," in E. Collins, International Law in a Changing World 237, 237-38 (1970) [hereinafter cited as Collins]. See also the older scholars listed in Sucharitkul, supra note 102, at 259-60.

125. See, e.g., I. L. Oppenheim, International Law 273-74 (2d ed. H. Lauterpacht 1955) [hereinafter cited as Oppenheim]; J. Brierly, The Law of Nations 250-51 (6th ed. 1963) [hereinafter cited as Brierly]; C. Amerasinghe, Studies in International Law 252 (1969) [hereinafter cited as Amerasinghe];

Sucharitkul, supra note 102, at 313. Lauterpacht asserts in Oppenheim, supra, at 274, that, in view of state practice, it is not certain whether--or to what extent--the question can be regarded as affirmatively regulated by International Law. In particular, it is doubtful whether a State would be incurring international responsibility as a result of its courts assuming jurisdiction--including that of execution--over foreign States and their property except in cases in which customary International Law has, through uniform practice, crystallised into a generally or universally accepted rule, for instance, with regard to diplomatic immunity and the immunity of Heads of State and of warships. . . . [T]he situation must be regarded as governed, in particular cases, by the Municipal Law of the country concerned.

126. See, e.g., D. O'Connell, International Law 913 (1965) [hereinafter cited as O'Connell]; Collins, supra note 124, at 228; Sweeney, supra note 102, at 22. See also the lists of scholars in Sucharitkul, supra note 102, at 265-66.

127. Some scholars question whether the existence of treaties restrictive of immunity support or subtract from the view that international law permits the restrictive view of immunity. They believe the treaties could be evidence that the signatories expect customary international law to prescribe absolute immunity in the absence of a specific treaty provision. See, e.g., Brownlie, supra note 124, at 278. The better view is that restrictive treaties help to establish a custom restrictive of immunity. They are evidence that immunity from judicial process is relatively unimportant to the signatory nations. Hence they create an expectation, even among nonsignatory nations, that a signatory nation is not likely to impose sanctions for its or other nations' subjection to judicial process for commercial activities. Hence, they support the restrictive view.

128. See cases cited in Sweeney, supra note 102, at 26-38; Collision with Foreign Government-Owned Motor Car (Austria) Case, 84 J.B. 43, 40 I.L.R. 73 (Austria, Sup: Ct. 1961) (court looks to "the act itself . . . and not its motive or purpose"; driving mail to embassy is private act); Claim against the Empire of Iran Case, 16 Ent. Bund. 27, 45 I.L.R. 57 (Fed. Rep. Ger., Fed. Const. Ct. 1963), in 6 Whiteman, supra note 9, at 566-69 (characterization according to "the nature of the State transaction or the resulting legal relationship, and not to the motive or purpose"; execution of concession contract is

private act); *Societe Europeene D'Etudes et D'Enterprises v. Yugoslavia* (Neth., High Council 1973), in 14 Int'l Legal Materials 71 (1975) (execution of agreement for construction of railroad is private act regardless of its military or strategic importance); *Republic Arabe Unie c. Dame X*, 86 *Ent. Schweiz. Bund.* 23 (Switz., Sup. Ct. 1960) (lease of house for diplomatic purposes is private act; nature of act, whether capable of performance by private individual, is test). The French and Italian courts apply domestic standards which do not clearly embody either the "nature" or "purpose" test. Compare *Societe Transshipping v. Federation of Pakistan*, [1966] *Bull. Civ.* 1 120, 47 *Int'l L. Rep.* 150 (Fr., Ct. of Cass. 1966) (contract executed by army for construction of water distribution and drainage works is public act); *Faure v. Italian State*, 56 *Rev. Crit. de Droit Int'l Priv.* 158 (1967); 45 *I.L.R.* 83 (Fr., Ct. of Cass. 1965) (guarantee of railroad's obligations in reorganization is public act); *Entreprise Perignon v. Gouvernement des Etats-Unis*, 69 *R.G.D.I.P.* 532 (1965); *I.L.R.* 82 (Fr., Ct. of Cass. 1964) (execution of contract to build housing for Marshall Plan officials is public act), and *Guggenheim v. State of Vietnam*, 66 *R.G.D.I.P.* 654 (1962); 44 *I.L.R.* 74 (Fr., Ct. of Cass. 1961) (contract for supply of military supplies is public act), with *Societe Immobiliere des Cites Fleuries Lafayette v. United States of America*, 42 *I.L.R.* 123, 89 *Clunet* 133 (Ct. App. Paris 1960) (U.S. guarantee of servicemen's rents is private act, though for public purpose); *Braden Copper Company v. Le Groupement D'Importation des Metaux* (Fr., Trib. Paris 1972), in 12 Int'l Legal Materials 187 (1973) (garnishment of third party's commercial debt permitted in action for expropriation of copper mine), and *Societe Bauer-Marchal et Cie v. Gouvernement Turc*, 69 *R.G.D.I.P.* 1161 (1965); 47 *I.L.R.* 155 (Fr., Rouen Ct. of App. 1965) (guarantee of city's bonds is private act); see also *Hungarian Papal Institute v. Hungarian Institute (Academy) in Rome*, 44 *Rivista di Dritto Internaz.* 101 (1961), 40 *I.L.R.* 59 (It., Ct. of Cass. United Chambers 1960) (exclusion of plaintiff from library of cultural institute is public act); *Pauer v. Hungarian People's Republic*, 40 *Rivista di Dritto Internaz.* 248 (1957), [1957] *I.L.R.* 211 (It., Ct. of Cass. 1956) (nationalization of bank is public act).

129. The conventions generally speak of commercial "purposes," see notes 107-110 *supra*, but not uniformly.

130. See 1 *Oppenheim, supra* note 125, at 274; *O'Connell, supra* note 126, at 917-18; *Amerasinghe, supra* note 125, at 252; *Collins, supra* note 124, at 228.

131. In one sense the codification is less restrictive of immunity than international law. Newly enacted 28 U.S.C. § 1605(2) denies immunity only for commercial acts connected

in certain ways with the United States. See text at note 99a supra. This condition is apparently designed to deny immunity only when the court has, aside from the sovereignty of the defendant, jurisdiction to adjudicate under international law. See note 101 supra. However, the wording fails to account for other cases in which jurisdiction is permitted by established practice or international agreement. See, e.g., Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, August 27, 1965, 1 U.S.T. 1270, T.I.A.S. No. 6090. An earlier draft of the codification failed to make provision for admiralty actions based on claims not substantially affecting the United States, though consistent with international law. American courts have in the past exercised admiralty jurisdiction in actions between aliens, despite the absence of substantial effects on the United States from the transaction sued upon. See H.R. 3496, 93rd Cong., 1st Sess., Sec. 1 (1973). As enacted, however, the codification provides for such actions if they are based on a commercial activity of the foreign state. Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2893, 28 U.S.C. § 1605(b) (1976). (The present Legal Adviser may have been responsible for the change. See Leigh, "Sovereign Immunity--The Case of the 'Imias,'" 68 Am. J. Int'l L. 280, 287 (1974) [hereinafter cited as Leigh].) The codification's purpose in limiting the commercial actions permitted against foreign states to those affecting the United States--to prevent courts from exceeding the jurisdiction permitted them by international law--would be better achieved by permitting the courts to apply the settled rule of statutory construction which avoids interpretation of jurisdictional statutes contrary to international law whenever possible. See notes 32 and 67 supra.

132. Letter from Legal Adviser Becker to Attorney General William Rogers, March 9, 1959, quoted in Stephen v. Zivnostenska Banka, National Corp., 15 A.D.2d 111, 222 N.Y.S.2d 128, 133-34 (1961), aff'd, 12 N.Y.2d 781, 235 N.Y.S.2d 1 (1962); see also Letter from Department of State to Attorney General, December 28, 1961, in 6 Whiteman, supra note 9, at 634-35; Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S.2d 469, 472 (Sup. Ct. 1959); Letter from Department of State, Sept. 18, 1962, in 57 Am. J. Int'l L. 408 (1963).

133. See Stephen v. Zivnostenska Banka, National Corp., 15 A.D.2d 111, 222 N.Y.S.2d 128, 134 (1961), aff'd, 12 N.Y.2d 781, 235 N.Y.S.2d 1 (1962).

134. See City of New Rochelle v. Republic of Ghana, 44 Misc. 2d 773, 255 N.Y.S.2d 178, 180 (City Ct. 1964); Letter from Legal Adviser Chayes to Attorney General Kennedy, Dec. 13, 1961, in 6 Whiteman, supra note 9, at 718, quoted in State ex rel. National Institute of Agrarian Reform v. Dekle, 137 So.2d

581, 582 (Fla. App.), cert. denied, 146 So.2d 753 (Fla. 1962) (Department recognizes immunity from execution of real property apparently not used for a public purpose).

135. One court held that there is a "general international understanding, recognized by civilized nations, that a sovereign's person and property ought to be held free from seizure or molestation at all peaceful times and under all circumstances." *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705, 708 (2d Cir. 1930), cert. denied, 282 U.S. 896 (1931), in which the Court held immune from execution to satisfy a previously recorded judgment funds of the foreign sovereign held in New York banks and a debt owed the sovereign by a private shipping firm. But cf. *S.T. Tringali Co. v. Tug Pemex XV*, 274 F. Supp. 227, 230 (S.D. Tex. 1967), in which the court stated that commercial property of an instrumentality of a foreign state is not immune from execution.

136. *Flota Maritima Browning de Cuba, S.A. v. Snobl*, 363 F.2d 733, 737 (4th Cir.), cert. denied, 385 U.S. 837 (1966), an admiralty case holding that a waiver of immunity from attachment by the making of a general appearance constitutes a waiver of immunity from execution as well.

137. *United States v. Harris and Company Advertising, Inc.*, 149 So.2d 384, 385-86 (Fla. App. 1963).

138. Opened for signature August 27, 1965, 1 U.S.T. 1270, T.I.A.S. No. 6090.

139. In Articles 53 and 54, the Convention provided that signatories should give the same effect to arbitral awards made under the Convention that they give to the judgments of their own courts. But Article 55 preserved existing immunities of foreign states from execution:

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or any foreign State from execution.

Congress's implementation of the Convention, Act of Aug. 11, 1966, Pub. L. No. 89-532, § 3, 80 Stat. 344, 22 U.S.C.A. § 1650a, equates awards with judgments of state courts:

(a) An award of an arbitral tribunal rendered pursuant to Chapter IV of the convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.

Under prior law, however, judgments of a state court were not enforceable against a foreign state's property without its consent. Moreover, the prevailing American view was that waiver of immunity from judicial process, not initiated by attachment of property, for a determination of legal rights does not constitute a waiver of immunity from execution of a resulting judgment. See note 192 infra. Thus, unless the foreign state executed an express waiver of its immunity from execution, either before or after the dispute had arisen, international arbitral awards made under the Convention were unenforceable in the United States under prior law. See Comment, "A New Approach to United States Enforcement of International Arbitration Awards," 1968 Duke L. J. 258, 277-78; cf. W. Reisman, Nullity and Revision: The Review and Enforcement of International Judgments and Awards 811-15 (1971); Reisman, "The Enforcement of International Judgments," 63 Am. J. Int'l L. 1, 11-12 (1969). The Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2892, 28 U.S.C. § 1602 et seq. (1976), modifies prior law in this regard. See text at notes 141-44 infra.

141. Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2897, 28 U.S.C. § 1611(b) (1976). The codification provides for an additional category of assets absolutely immune from execution. It includes funds designated for disbursement to a foreign state and held by an international organization designated by the President pursuant to the International Organizations Immunity Act, 59 Stat. 669, 22 U.S.C. § 288 (1945). Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2897, 28 U.S.C. § 1611(a) (1976).

142. Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2895, 28 U.S.C. § 1609 (1976).

142a. What constitutes a "reasonable period of time" will depend upon the internal procedures a foreign state must follow to pay a judgment and representations by the state that it is taking steps to satisfy the judgment, on the one hand, or evidence that the state is attempting to remove assets from the jurisdiction on the other hand. Report, supra note 4, at 30.

143. Id., 28 U.S.C. § 1610(a). The House Judiciary Committee interprets newly enacted 28 U.S.C. § 1610(a)(3) to permit execution of a judgment establishing rights to property taken in violation of international law only against the property to which that judgment established rights or property exchanged for such property. That interpretation seems erroneous and should not be followed, however, since a judgment establishing rights in property may also grant in personam relief which can be enforced against other commercial property owned by the

foreign state defendant. Thus, a corporation whose property has been taken in violation of international law may bring an action to claim ownership of some of the property brought into the United States and to recover a monetary judgment against the foreign state for the value of the remainder of the property. See text accompanying notes 221-25 *infra*. A resulting monetary judgment is enforceable against any of the foreign state's commercially engaged property in the United States. A judgment which establishes both rights in a bequest or realty and a monetary liability is similarly enforceable against any commercially engaged property of the foreign state defendant located in the United States. 28 U.S.C. § 1610(a)(4).

144. *Id.*, 28 U.S.C. § 1610(b). 28 U.S.C. § 1605(2) permits actions based on a foreign sovereign's commercial acts; 28 U.S.C. § 1605(3) permits actions to establish rights to property, or property exchanged for such property, taken in violation of international law and present in the United States; and 28 U.S.C. § 1605(5) permits actions to recover damages for personal injury, death, or property damage caused by a tortious act within the United States of the foreign sovereign or its employees. However, the codification does not provide for unrestricted execution against property of an agency or instrumentality of a foreign state if the judgment being enforced was based on the foreign entity's waiver of immunity from suit or an action concerning real property owned by the entity.

146. The United States and France have both followed the restrictive rule of immunity from suit and the absolute rule of immunity from execution. See text accompanying notes 72-95 and 132-39 *supra*; *Statni Bank v. Englander*, 93 J.D.I. 846 (1966), 47 I.L.R. 157 (Fr., Aix-en-Provence Ct. of App. 1966); *Societe Bauer-Marchal et Cie v. Gouvernement Turc*, [1965] R.G.D.I.P. 1161, 47 I.L.R. 155 (Fr., Rouen Ct. of App. 1965):

147. *Soviet Distillery in Austria Case*, 9 VwGH 5 83 *Clunet* 86, [1954] I.L.R. 101 (Austria, Adm. Ct. 1954) (confiscation of Soviet owned spirits for their illegal manufacture); *Socobel v. Greek State*, 79 *Clunet* 244 (1952), [1951] I.L.R. 3 (Belgium, Civ. Trib. Brussels 1951) (enforcement of arbitral award of Belgian corporation against Greek accounts in Belgian banks); *Decision of the Supreme Court*, 64 *Clunet* 394 (1937), 26 *Am. J. Int'l L. Supp.* 585 (Czech. 1928) (execution of arbitral award against immovable property; rev'd because property used by diplomatic personnel); *Egyptian Delta Rice Mills v. Comisaria General de Abastecimientos y Transportes de Madrid*, 55 *B.L.J.E.* 114, [1943] *Ann. Dig.* 103 (Egypt, Com. Trib. Alexandria 1943) (execution against funds of state commercial agency); *Typaldos v. Manicomio de Aversa*, [1886] G.I. 1, 228 (It., Naples Ct. of

App. 1882) (execution of debt against immovable property of a foreign state); *Societe Europeene D'Etudes et D'Enterprises v. Yugoslavia* (Neth., High Council 1973), in 14 Int'l Legal Materials 71 (1975) (enforcement of international arbitration award against Yugoslavia permitted); *N.V. Cabolent v. National Iranian Oil Company*, [1969] *Nederlandse Jurisprudentie* 1329 No. 484, 47 Int'l L. Rep. 141, in 9 Int'l Legal Materials 152 (1970) (Neth., Hague Ct. of App. 1968) (garnishment of accounts owed by Dutch oil companies to state oil corporation to enforce international arbitral award); 55 Am. J. Int'l L. 371-75 (1970) (garnishment of debts owed branch bank of Bank of People's Republic of China by Singapore for violation of banking laws); *Republic Arabe Unie c. Dame X*, 86 Ent. Schweiz. Bund. 23 (Switz., Sup. Ct. 1960), in 55 Am. J. Int'l L. 167 (1961) (garnishment of U.A.R. commercial escrow account in satisfaction of damages owed on lease of house).

148. See Sucharitkul, *supra* note 102, at 262-63; Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," 28 Brit. Y. B. Int'l L. 220, 242-43 (1951) [hereinafter cited as Lauterpacht]; Note, *supra* note 112, at 913-14.

149. Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, adopted April 10, 1926, 176 L.N.T.S. 199, 3 Hudson, International Legislation 1837. See note 107 *supra*.

150. Convention on the Territorial Sea and the Contiguous Zone, adopted April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205. See note 108 *supra*.

151. See note 110 *supra*.

152. Article 23 of the Convention exempts the assets of foreign central governments from execution:

No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case.

Articles 27 and 28 prevent the distinct agencies, instrumentalities and political subdivisions of a Contracting State, other than component states of a federation under certain circumstances, from being sheltered by this provision, however.

Article 27 provides, in part:

1. For the purposes of the present Convention, the expression "Contracting State" shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions.

Article 28 provides, in part:

1. Without prejudice to the provisions of Article 27, the constituent States of a Federal State do not enjoy immunity.

2. However, a Federal State Party to the present Convention, may, by notification addressed to the Secretary General of the Council of Europe, declare that its constituent States may invoke the provisions of the Convention applicable to Contracting States, and have the same obligations.

In addition, Article 26 provides that judgments obtained under the Convention

in proceedings relating to an industrial or commercial activity, in which the State is engaged in the same manner as a private person, may be enforced in the State of the forum against property of the State against which judgment has been given, used exclusively in connection with such an activity

if both states have declared their intention to restrict immunity in such a way. The Convention does not prevent execution of judgments obtained for activities described in Article 1 of the Brussels Convention (see notes 107 and 149 supra).

Article 30. Finally, the draftsmen have interpreted the Convention to permit execution against a foreign state's property in enforcement of an arbitral award, since the Convention prevents enforcement only of judgments obtained thereunder.

Council of Europe, Explanatory Reports on the European Convention on State Immunity and the Additional Protocol 21, 33 (1972).

153. Note, supra note 112, at 913.

154. See notes 113 and 114 supra.

155. See notes 115 and 116 supra.

156. Supra note 118, at 459. Article 25 submits to execution a foreign state's immovable property and property used in connection with an enterprise engaged in commercial, financial or other business activities.

157. Resolution on Immunity of Foreign States from Jurisdiction and Measures of Execution, May 30, 1954, Art. 5, 45-11 Annuaire 301, 302 (1954). The resolution extended immunity only to the property of a foreign state employed for governmental activities unconnected with economic undertakings.

158. Oslo Resolution of the Council of the International Bar Association, March 1957, quoted in Reeves, "Good Fences and Good Neighbors: Restraints on Immunities of Sovereigns," 44 A.B.A.J. 521, 522-23 (1958) [hereinafter cited as Reeves].

159. 1 Oppenheim, supra note 125, at 274; Lauterpacht, supra note 148, at 242; Lalive, "L'Immunité de Jurisdiction des Etats et des Organisations Internationales," 84 Recueil des Cours 205, 275 (1953); Garcia-Mora, "The Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications," 42 Va. L. Rev. 335, 359 (1956); Sørensen, "Principes de Droit International Public," 101 Recueil des Cours 1, 172 (1960); Sucharitkul, supra note 102, at 263 and 347; Sweeney, supra note 102, at 23; the remarks of Monroe Leigh in "New Departures," supra note 13, at 190.

160. Asian-African Legal Consultative Committee, 3d Sess. (Colombo), Final Report 67-68 (1960), quoted in 6 Whiteman, supra note 9, at 572-74.

161. Sweeney, supra note 102, at 23.

162. 26 Dept. State Bull. 984 (1952). See text accompanying notes 72 and 73 supra.

163. New York and Cuba Mail Steamship Co. v. Republic of Korea, 132 F. Supp. 684, 685 (S.D.N.Y. 1955). This view seemed inconsistent with the Department's long-established policy of permitting exercise of admiralty jurisdiction over commercial vessels of foreign sovereigns, which is initiated by arrest of the vessel.

164. Quoted in Stephen v. Zivnostenska Banka, National Corp., 15 A.D.2d 111, 222 N.Y.S.2d 128, 134, aff'd, 12 N.Y.2d 781, 235 N.Y.S.2d 1 (1962); see also Ocean Transport Co. v. Government of the Republic of the Ivory Coast, 269 F. Supp. 703, 705 n.8 (E.D. La. 1967). For an application of this view, see Mirabella v. Banco Industrial de la Republica Argentina, 38 Misc. 2d 128, 237 N.Y.S.2d 499 (Sup. Ct. 1963). Since the Department's decision to permit attachment for the purpose of obtaining jurisdiction, federal courts have permitted service of process on the foreign state by mail, care of its embassy in Washington, to obtain in personam jurisdiction, reducing the decision's importance. See Renchard v. Humphreys & Harding, Inc., 59 F.R.D. 530 (D.D.C. 1973); Caravel Office Building Co. v. Peruvian Air Attache, No. 9185 (D.C. Ct. App. 1975), in 14 Int'l Legal Materials 1435 (1975).

165. Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705, 708 (2d Cir. 1930), cert. denied, 282 U.S. 896 (1931); Auer v. Costa, 23 F. Supp. 22 (D. Mass. 1938). The earlier decisions which allowed admiralty jurisdiction to be asserted against publicly owned commercial vessels allowed arrest of those vessels, however. See note 85 supra.

166. S.T. Tringali Co. v. Tug Pemex XV, 274 F. Supp. 227, 230 (S.D. Tex. 1967); Harris & Co. Advertising, Inc. v. Republic of Cuba, 127 So.2d 687, 692 (Fla. App. 1961).

167. In Compania Espanol de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68, 75, 58 S.Ct. 432, 82 L.Ed. 667 (1938),

the Supreme Court stated that a ship owned by a foreign sovereign would be entitled to immunity from arrest in an admiralty case if the sovereign proved his ownership and right to possession. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 65 S.Ct. 530, 89 L.Ed. 729 (1945), held that a vessel owned, but not possessed, by a foreign sovereign was not entitled to immunity. See Restatement (Second) § 68(a) (1965). Earlier decisions had held that possession without ownership was sufficient to make the property immune. *Yokohama Specie Bank, Ltd. v. Chenting T. Wang*, 113 F.2d 329 (9th Cir.), cert. denied, 311 U.S. 690 (1940); *The Janko (The Norsktank)*, 54 F. Supp. 241, 244 (E.D.N.Y. 1944); *The Roseric*, 254 F. 154 (D.N.J. 1918). Cf. *Sullivan v. State of Sao Paulo*, 122 F.2d 355, 360 (2d Cir. 1941) (L. Hand, J., concurring) ("[T]he violation of a friendly foreign state's possession is so grave an indignity as ipso facto to embarrass the relations between that state and the state of the forum"). The legal owner of a bank account--attachment of which is the simplest method of obtaining jurisdiction over a foreign sovereign--was considered to be in possession of the funds represented by the account. *Bradford v. Chase National Bank*, 24 F. Supp. 28, 38 (S.D.N.Y. 1938), aff'd sub nom. *Berger v. Chase National Bank*, 105 F.2d 1001 (2d Cir. 1939), aff'd, 309 U.S. 632 (1940).

168. Sec. 4(a), 90 Stat. 2895, 28 U.S.C. §§ 1609, 1610(d) (1976).

169. *Id.*, 28 U.S.C. § 1608. The Hague Convention on Service of Process Abroad of Judicial and Extrajudicial Documents, T.I.A.S. No. 6618, 20 U.S.T. 361, will govern service of process against any of its 17 other signatories. The codification has also substituted a form of personal service as means for instituting an action against a foreign sovereign ship owner to assert a maritime lien for the traditional method of initiating a maritime claim--arrest of the vessel or cargo. *Id.*, 28 U.S.C. § 1605(b). Arrest of the vessel or cargo to acquire jurisdiction is now prohibited unless its immunity has been waived. *Id.*, 28 U.S.C. §§ 1609, 1610(d).

169-1. Report, *supra* note 4, at 27.

170. See generally *Sweeney*, *supra* note 102, at 22-23 and 46-51.

171. Pre-judgment attachment of a defendant's property serves two purposes in the United States: (1) it secures quasi-in-rem jurisdiction and (2) it conserves assets available for satisfaction of the judgment if the action is successful. Because execution was not formerly permitted against a foreign state's property in this country, only attachment for the purpose of acquiring jurisdiction was allowed. The codification now permits execution against a foreign state's property in limited cases, but it prohibits attachments to achieve either

purpose. A private litigant will be able to obtain in personam jurisdiction and will be entitled to execute against certain property if successful in his suit, but he cannot assure that assets of the foreign state defendant will be available for satisfaction of his judgment. This deficiency in the proposed statutory scheme is especially significant in view of the scheme's limitation of the right to execute to particular property or to property connected to a particular activity. See text accompanying notes 141-44 supra. Thus, the right of personal service is not a complete substitute for the right to attach.

172. See *Isbrandtsen Co. v. Netherlands East Indies Government*, 75 F. Supp. 48 (S.D.N.Y. 1948) (government of the territorial possession of a foreign sovereign); *Piascik v. British Ministry of War Transport*, 54 F. Supp. 487 (S.D.N.Y. 1943) (ministry of the central government); *Hellenic Lines, Ltd. v. Embassy of South Vietnam*, 275 F. Supp. 860 (S.D.N.Y. 1967) (central bank owned by the foreign sovereign); *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974) (shipping corporation owned by the Cuban government); *State ex rel. National Institute of Agrarian Reform v. Dekle*, 137 So.2d 581 (Fla. App.), cert. denied, 146 So.2d 753 (1962). The most recent general statement by the Department on this subject appeared in a letter from the Department dated January 25, 1960, quoted in *In re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298, 318 (D.D.C. 1960):

[T]he Department of State follows the so-called restrictive theory of sovereign immunity. Under this theory, a foreign government (including its instrumentalities) is entitled to immunity from the jurisdiction of the courts of the territorial sovereign only with regards to governmental acts (*jure imperii*) as distinguished from private or commercial activities (*jure gestionis*). [emphasis added]

But cf. *Sullivan v. State of Sao Paulo*, 36 F. Supp. 503, 504 n.1, 505 n.2 (E.D.N.Y.), aff'd, 122 F.2d 355 (1941), in which the Department took no position as to the immunity of states of the Republic of Brazil; *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining & Distribution of Petroleum*, 13 F.R.D. 280, 291 (D.D.C. 1952), in which it took no position as to the immunity of a private corporation organized and controlled by the British government for the purpose of insuring the oil supply of its fleet.

173. *Sullivan v. State of Sao Paulo*, 122 F.2d 355 (2d Cir. 1941); *McConahy v. City of London Corp.*, 381 F. Supp. 728

(D.N.J. 1974); *Johns-Manville International Corp. v. Insul-Fil Co.*, 41 Misc. 2d 233, 245 N.Y.S.2d 14 (Sup. Ct. 1963), modified, 21 A.D.2d 764, 250 N.Y.S.2d 445 (1964). Cf. *Bradford v. Chase National Bank*, 24 F. Supp. 28, 38 (S.D.N.Y. 1938), aff'd sub nom. Berger v. Chase National Bank, 105 F.2d 1001 (2d Cir. 1939), aff'd, 309 U.S. 632 (1940), in which immunity was granted to assets of an American protectorate, the Philippines, on foreign sovereign immunity grounds. But see *Schneider v. City of Rome, Italy*, 193 Misc. 180, 83 N.Y.S.2d 756 (Cty. Ct. 1948).

174. *Oliver American Trading Co. v. Government of the United States of Mexico*, 5 F.2d 659, 666-67 (2d Cir. 1924), cert. denied, 267 U.S. 596 (1925).

175. Compare In re Grand Jury Investigation of the Shipping Industry, 186 F. Supp. 298 (D.D.C. 1960) (government owned shipping line is immune from subpoena absent showing that its activities are substantially commercial), and In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining & Distribution of Petroleum, 13 F.R.D. 280 (D.D.C. 1952) (corporation organized and controlled, but not owned, by British government to insure the oil supply of its fleet is immune from subpoena), with *S.T. Tringali Co. v. Tug Pemex XV*, 274 F. Supp. 227 (S.D. Tex. 1967) (assets of government owned petroleum corporation not immune from execution); *The Uxmal*, 40 F. Supp. 258 (D. Mass. 1941) (corporation partly owned and controlled by Mexican government to promote the sisal industry not immune from suit); *United States v. Deutsche Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929) (corporation organized and controlled by French government to administer French potash mining and act as sales agent for state mines not immune from suit); and *Coale v. Societe Co-operative Suisse des Charbons, Basle*, 21 F.2d 180 (S.D.N.Y. 1921) (assets of corporation organized by Swiss government to regulate the importation of coal not immune from execution). In *Miller v. Ferrocarril Del Pacifico de Nicaragua*, 137 Me. 251, 18 A.2d 688 (1941), immunity was extended to a Maine corporation organized by Nicaragua to obtain and exploit rail and shipping lines to that land on the doubtful belief that the State Department had approved the claim to immunity. In any event, under prior law the instrumentality had to prove its affiliation with the foreign sovereign to be immune. *Anaconda Co. v. Corporacion del Cobre*, 55 F.R.D. 16, 18 (S.D.N.Y. 1972); *Pan American Tankers Corp. v. Republic of Vietnam*, 291 F. Supp. 49, 52 (S.D.N.Y. 1968).

The Restatement appears to have required immunity for government agencies and instrumentalities performing a governmental function but not for political subdivisions. Compare Restatement (Second) § 66 with § 67 (1965).

176. *Lamont v. Travelers Insurance Co.*, 281 N.Y. 362, 24 N.E.2d 81 (1940); *Frazier v. Hanover Bank*, 204 Misc. 922, 119 N.Y.S.2d 319, 321 (Sup. Ct.), *aff'd*, 281 A.D. 861, 119 N.Y.S. 2d 918 (1953), both contests of distributions of payments on a foreign sovereign's public debt proposed by American bankers.

177. The codification defines "foreign state" to include political subdivisions, agencies and instrumentalities of the state. Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2892, 28 U.S.C. § 1603(a). An "agency or instrumentality of a foreign state" is defined as an entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

Id., 28 U.S.C. § 1603(b).

178. See id., 28 U.S.C. § 1608.

179. Id., 28 U.S.C. § 1610(b). See text at note 144

supra.

182. See Sweeney, supra note 102, at 52; Sucharitkul, supra note 102, at 106; *Montefiore v. Colony of the Belgian Congo*, 89 J.D.I. 687 (1962), 64 R.G.D.I.P. 656 (1960), 44 I.L.R. 72 (Fr., Ct. of Cass. 1961).

183. Sweeney, supra note 102, at 54-55.

184. *Societe Anonyme "Dhellemes et Masurel" v. Banque Centrale de la Republique de Turquie*, 45 I.L.R. 85, 86-87 (Belgium, Brussels Ct. of App. 1963); *N.V. Cabolent v. National Iranian Oil Company*, [1969] *Nederlandse Jurisprudentie* 1329, 47 I.L.R. 141, (Neth., Hague Ct. of App. 1968), in 9 Int'l Legal Materials 152 (1970).

185. See Sweeney, supra note 102, at 55; Sucharitkul, supra note 102, at 108, 112.

186. See note 110 supra.

187. Article 27 of the Convention provides:

1. For the purposes of the present Convention, the expression "Contracting State shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions.

2. Proceedings may be instituted

against any entity referred to in paragraph 1 before the courts of another Contracting State in the same manner as against a private person; however, the courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority (acta jure imperii).

3. Proceedings may in any event be instituted against any such entity before those courts if in corresponding circumstances, the courts would have had jurisdiction if the proceedings had been instituted against a Contracting State.

188. Article 28 of the Convention states, in part:

1. Without prejudice to the provisions of Article 27, the constituent States of a Federal State do not enjoy immunity.

2. However, a Federal State Party to the present Convention, may, by notification addressed to the Secretary General of the Council of Europe, declare that its constituent States may invoke the provisions of the Convention applicable to Contracting States, and have the same obligations.

Otherwise, the Convention extends immunity only to "Contracting States" and their property, not to their political subdivisions.

189. See, e.g., Brierly, supra note 125, at 246-47; O'Connell, supra note 126, at 946; Sucharitkul, supra note 102, at 104; Restatement (Second) § 66 Reporters' Note 2 and § 67 Reporters' Notes 1-3 (1965).

190. After the Supreme Court decided National City Bank v. Republic of China, see text accompanying notes 26-29 supra, the Chinese Ambassador sought the State Department's aid in gaining immunity from the defendant's counterclaim. The Department denied this request.

. . . The Chinese Government has sought the assistance of a United States court to recover its deposits with the defendant bank. The Chinese Government is, therefore, within the jurisdiction of the court not against its will but on its own initiative. The immunity, if any, which it had in the existing circumstances has thus been waived. Having sought the application to the defendant of American law, it is in no position to contend that any defenses available under that law to the defendant should be denied.

The Department stated that the waiver applied irrespective of whether the state act upon which the counterclaim is based was "private" or "public." Letter from Department of State to Ambassador of the Republic of China, Sept. 26, 1955, 23 Dept. State Bull. 750-51 (1955), 6 Whiteman, supra note 9, at 683.

190a. See United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577, 579-81 (1944), aff'd on rehearing, 294 N.Y. 265, 62 N.E.2d 64 (1945).

191. Compare Flota Maritima Browning de Cuba, S.A. v. M.V. Ciudad de la Habana, 218 F. Supp. 938, 943 (D. Md. 1963), aff'd, 335 F.2d 619 (4th Cir. 1964), with Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710, 712 (E.D. Va.), aff'd, 295 F.2d 24 (4th Cir. 1961).

192. Ervin v. Quintanilla, 99 F.2d 935, 938 (5th Cir. 1938), cert. denied, 306 U.S. 635 (1939); Flota Maritima Browning de Cuba, S.A. v. Snobl, 363 F.2d 733, 737 (4th Cir.), cert. denied, 385 U.S. 837 (1966); Flota Maritima Browning de Cuba, S.A. v. M.V. Ciudad de la Habana, 335 F.2d 619, 624-25 (4 Cir. 1964). The last cited two cases established that immunity from execution could not be asserted after a waiver of immunity from attachment. But immunity from execution could be asserted after a waiver of immunity from suit only. Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705, 708 (2d Cir. 1930), cert. denied, 282 U.S. 896 (1931). See also Restatement (Second) § 70 (1965).

193. Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1199-1200 (2d Cir.), cert. denied, 404 U.S. 985 (1971); Flota Maritima Browning de Cuba, S.A. v. M.V. Ciudad de la Habana, 335 F.2d 619, 625 (4th Cir. 1964); Rich v. Naviera Vacuba, S.A., 295 F.2d 24, 26 (4th Cir. 1961); Miller v. Ferrocarril Del Pacifico de Nicaragua, 137 Me. 251, 18 A.2d 688, 692 (1941). But cf. Ex parte Republic of Peru, 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943), in which the Court first held that the foreign state had not waived its immunity before giving effect to the State Department's recognition and allowance of immunity.

194. The Mangalia, 1942 A.M.C. 35, 39 (S.D.N.Y. 1941).

195. Id.

196. Ervin v. Quintanilla, 99 F.2d 935, 938 (5th Cir. 1938), cert. denied, 306 U.S. 635 (1939); Flota Maritima Browning de Cuba v. Snobl, 363 F.2d 733, 737 (4th Cir.), cert. denied, 385 U.S. 837 (1966); Flota Maritima Browning de Cuba v. M.V. Ciudad de la Habana, 335 F.2d 619, 625 (4th Cir. 1964); The Sao Vicente, 295 F. 829, 831-32 (3rd Cir. 1924); The Sao Vicente, 281 F. 111, 115 (2d Cir.), cert. dismissed, 260 U.S. 151 (1922), petition for writ of prohibition and/or mandamus dismissed, 264 U.S. 105 (1924). If, however, the general ap-

pearance was accompanied by a reservation of the right to reassert the issue of immunity, it was not a waiver. Ex parte Republic of Peru, 318 U.S. 578, 589, 63 S.Ct. 793, 87 L.Ed. 1014 (1943).

197. The Mangalia, 1942 A.M.C. 35, 39 (S.D.N.Y. 1941).

198. National City Bank v. Republic of China, 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389 (1955). See text accompanying notes 26-29 supra. The courts differed on the extent to which filing of an action constitutes a waiver of immunity from a related but distinct defensive action. Compare Wacker v. Bisson, 348 F.2d 602 (5th Cir. 1965) (initiation of extradition proceedings constituted a waiver by the sovereign of immunity from a declaratory judgment action challenging the validity of a nonappealable extradition order), with Kingdom of Roumania v. Guaranty Trust Co., 250 F. 341, 345 (2d Cir.), cert. denied, 246 U.S. 663 (1918) (initiation of proceedings is not a waiver of immunity from an interpleader between the sovereign and a third party); Republic of Iraq v. First National City Trust Co., 207 F. Supp. 588, 591 (S.D.N.Y. 1962), appeal dismissed, 313 F.2d 194 (2d Cir. 1963) (removal of a federal action by a sovereign against the administrator of the deceased king to a state surrogate's court denied because initiation of the federal proceedings waived defensive actions in the federal court only); and In re Hughes & Company, 9 Misc. 2d 16, 172 N.Y.S.2d 441 (Sup. Ct. 1957) (plenary action by assignee for benefit of creditors is not a waiver of immunity from a motion to enjoin prosecution of the action made by the assignee in the assignment action). One court held that the waiver made by initiation of suit permits affirmative relief for the defendant beyond set-off if the counterclaim arises from the same transaction. Et Ve Balik Kurumu v. B.N.S. International Sales Corp., 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960), aff'd, 17 A.D.2d 927, 233 N.Y.S.2d 1013 (1962). Initiation of suit constituted a waiver of immunity to discovery proceedings brought by the defendant. See Republic of Haiti v. Plesch, 195 Misc. 219, 88 N.Y.S.2d 9 (Sup. Ct.), modified, 275 A.D. 804, 89 N.Y.S.2d 608 (1949).

199. See Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710, 719 (E.D. Va.), aff'd, 295 F.2d 24 (4th Cir. 1961) (quoting from stipulation entered by the foreign state's attorney in connection with a consent judgment in a state proceeding waiving immunity from execution); Pacific Molasses Co. v. Comite de Ventas de Mieles de la Republica Dominicana, 30 Misc. 2d 560, 219 N.Y.S.2d 1018, 1020 (Sup. Ct. 1961) (clause in contract for sale of molasses providing that "[a]ny controversy or claim arising out of, or relating to this contract, or for the breach thereof, shall be referred to the courts having jurisdiction in accordance with international law" constitutes enforceable

waiver of immunity); but see Delaume, "Public Debt and Sovereign Immunity: Some Considerations Pertinent to S.566," 67 Am. J. Int'l L. 745, 746 (1973) [hereinafter cited as Delaume], which states that contractual waivers of immunity are ineffective in the United States. The courts seemed reluctant to find a prior irrevocable contractual waiver of immunity, however. See Southeastern Leasing Corp. v. Stern Dragger Belogorsk Etc., 493 F.2d 1223, 1224 (1st Cir. 1974) (U.S.S.R. treaty obligation to make its vessels "subject to the applicable laws and regulations of the United States" is not a waiver of immunity from suit by a private party); Loomis v. Rogers, 254 F.2d 941, 934 (D.C. Cir. 1958), cert. denied, 359 U.S. 928 (1959) (Treaty of Peace with Italy providing that property of Italy within the United States may be applied to the claims of American nationals against Italy was not a waiver of immunity from suits by private parties); but see Basner v. Andrews, 72 Misc. 2d 228, 339 N.Y.S.2d 67 (City Ct. 1972) (purchase of automobile liability insurance is a waiver of immunity from suit within policy coverage). Nevertheless, in some instances a foreign state may wish to make a voluntary waiver of its immunity. Chief Judge Bazelon has speculated about motives for such a waiver:

[A] sovereign sued in the United States might waive its immunity defense because it could more easily present its witnesses and evidence here or because the law would be more favorable here than in courts of alternative forums where it would have no immunity defense. The sovereign might also decide that an airing of the dispute in an independent judicial tribunal would favor its domestic policies or its foreign relations.

Hellenic Lines, Ltd. v. Moore, 345 F.2d 978, 979 n.1 (D.C. Cir. 1965).

200. Sec. 4(a), 90 Stat. 2892, 28 U.S.C. §§ 1605(a)(1), 1610(a)(1) and (b)(1) (1976).

201. Id., Report, supra note 4, at 18.

202. Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2892, 28 U.S.C. §§ 1605(a)(1), 1610(a)(1) and (b)(1) (1976); Report, supra note 4, at 18. Under the act, a contractual agreement to submit disputes to arbitration outside the foreign state or a clause providing that the contract should be governed by the United States' or a third country's laws would constitute an implicit waiver of immunity, partially overruling case law. Report, supra, at 18. However, a foreign state's courtroom appearance in an action does not constitute a waiver of immunity from unrelated claims. Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2891, 28 U.S.C. § 1330(c) (1976); Report, supra, at 14.

204. Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2894, 28 U.S.C. § 1607 (1976).

205. Sweeney, supra note 102, at 55; Limbin Hteik Tin Lat v. Union of Burma, 5 Kakyu. Minji. Saib. 836, 32 I.L.R. 124, 125 (Japan, Tokyo Dist. Ct. 1954); Ramiandrisoa v. French State, 40 I.L.R. 81 (Madagascar, Sup. Ct. 1965); Mahe v. Agent Judiciaire du Tresor Francais, 40 I.L.R. 80 (Madagascar, Ct. of App. 1965). The European Convention on State Immunity, note 110 supra, contains several provisions which give effect to waivers. Article 2 provides:

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has undertaken to submit to the jurisdiction of that court either:

- (a) by international agreement;
- (b) by an express term contained in a contract in writing; or
- (c) by an express consent given after a dispute between the parties has arisen.

Article 33 expressly permits international agreements to curtail immunities recognized by the Convention. Article 12 construes an agreement to arbitrate a nonpublic matter to be a waiver of immunity from proceedings to enforce that agreement (but not the award, which is not treated by the Convention). Finally, Article 26 permits a foreign state to waive immunity from execution in a forum state which has executed a similar waiver. See note 152 supra. Numerous other conventions and bilateral agreements include waivers of the signatories' immunity from judicial proceedings. See text accompanying notes 107-17, 149-55 supra.

206. Sweeney, supra note 102, at 55-56; Sucharitkul, supra note 102, at 354; Government of Peru v. S.A. Sociedad Industrial Financiera Argentina S.I.F.A.R., 26 I.L.R. 195 (Argentina, Sup. Ct. 1958) (consent to suit constitutes consent to execution of judgment); Bank voor Handel en Scheepvaart, N.V. v. Union Banking Corporation (Neth., Rotterdam Dist. Ct. 1964), in 4 Int'l Legal Materials 257, 273 (1965) (intervention to claim immunity for attached property constitutes waiver from counterclaim of noncommercial nature because immunity could have been sought without intervention); but see Ramiandrisoa v. French State, 40 I.L.R. 81 (Madagascar, Sup. Ct. 1965) (defense on merits does not constitute waiver, which must be express). Some courts construe a foreign state's initiation of suit to constitute a waiver of immunity only from counterclaims and set-offs arising out of the same transaction; some states limit counterclaims to set-offs. The states which fol-

low an absolute rule of immunity from execution do not consider a waiver of immunity from suit to include a waiver of immunity from execution. See Sweeney, supra, at 56.

The European Convention on State Immunity, note 110 supra, treats as a waiver institution of judicial proceedings, defending an action on the merits, or incorporating or locating an enterprise in conjunction with private persons within the jurisdiction of the forum state:

ARTICLE 1

1. A Contracting State which institutes or intervenes in proceedings before a court of another Contracting State submits, for the purpose of those proceedings, to the jurisdiction of the courts of that State.

2. Such a Contracting State cannot claim immunity from the jurisdiction of the courts of the other Contracting State in respect of any counterclaim:

(a) arising out of the legal relationship or the facts on which the principal claim is based;

(b) if, according to the provisions of this Convention, it would not have been entitled to invoke immunity in respect of that counterclaim had separate proceedings been brought against it in those courts.

3. A Contracting State which makes a counterclaim in proceedings before a court of another Contracting State submits to the jurisdiction of the courts of that State with respect not only to the counterclaim but also to the principal claim.

ARTICLE 3

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if, before claiming immunity, it takes any step in the proceedings relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it has taken such a step, it can claim immunity based on these facts if it does so at the earliest possible moment.

2. A Contracting State is not deemed to have waived immunity if it appears before a

court of another Contracting State in order to assert immunity.

ARTICLE 6

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it participates with one or more private persons in a company, association or other legal entity having its seal, registered office or principle place of business on the territory of the State of the forum, and the proceedings concern the relationship, in matters arising out of that participation, between the State on the one hand and the entity or any other participant on the other hand.

2. Paragraph 1 shall not apply if it is otherwise agreed in writing.

207. See Sucharitkul, supra note 102, at 276-77.

208. See Brownlie, supra note 124, at 283; C. Fenwick, International Law 370 (4th ed. 1965) [hereinafter cited as Fenwick].

208a. Sullivan v. State of Sao Paolo, 122 F.2d 355, 358-59 (2d Cir. 1941).

208b. 26 Dept. State Bull. 984 (1952). See text accompanying notes 72 and 73 supra.

208c. In Sullivan v. State of Sao Paolo, 122 F.2d 355 (2d Cir. 1941), the State Department was careful to base its recommendation that immunity be granted on the interests of the Republic of Brazil in funds attached to initiate an action on the debts of two Brazilian states rather than on any immunity of the states themselves.

209. See H.R. 3493, 93rd Cong., 1st Sess., Sec. 1, § 1606(a) (1973).

209a. Id., § 1606(b).

210. See H.R. 11315, 94th Cong., 1st Sess., Sec. 4(a), § 1606 (1975).

211. See text accompanying notes 99-101 supra. The House Judiciary Committee has interpreted the sale of a foreign state's bonds to the public and its borrowings from a commercial bank to be commercial activities for which the act grants no immunity. Report, supra note 4, at 10.

212. See G. Delaume, Legal Aspects of International Lending and Economic Development Financing 156-159 (1967); Delaume, supra note 199, at 746.

213. E.g., Royaume de Grece v. Banque Julius Bar et Cie, 82(1) R.O. 75, 23 I.L.R. 195 (Trib. fed. 1956); Etat Yougoslave v. S.A. Sogerfin (Trib. fed. 1938), in 61 La Semaine Judiciaire

327 (1939); *Republique Mellinique v. Walder*, 56(1) R.O. 237 (Trib. fed. 1930); *K.K. Oesterreichisches Finanzministerium v. Dreyfus*, 44(1) R.O. 49 (Trib. fed. 1918). The Swiss courts require that the debt obligation be connected with Switzerland in some way. France has permitted suit on a foreign state's guarantee of a municipality's obligations, *Societe Bauer-Marchal et Cie v. Gouvernement Turc*, 69 R.G.D.I.P. 1161 (1965), 47 I.L.R. 155 (Rouen Ct. of App. 1965), but seemed to have made suit on bonds of the Congo conditional on the absence of a Belgian state obligation on the bonds, *Montefiore v. Colony of the Belgian Congo*, 64 R.G.D.I.P. 656 (1960), 89 R.D.I. 687 (1962), 44 I.L.R. 72 (Ct. of Cass. 1961); see also *Faure v. Italian State*, 56 *Rev. Crit. de Droit Int'l Priv.* 159 (1967), 45 I.L.R. 83 (Fr., Ct. of Cass. 1965) (foreign state's guarantee of railroad company's bonds merits immunity). Belgium has permitted suit on a foreign state's assumption of a railroad company's obligations. *Brasseur v. La Republique Hellenique*, [1933-11] *Pas.* 197 (Brussels Ct. of App. 1933).

214. See *Montefiore v. Colony of the Belgian Congo*, note 213 *supra*; *Gouvernement du Land de Hesse v. Neger* (Fr., Paris Cour d'appel 1969), in 59 *Rev. Critique de Droit Int'l Prive* 703 (1970); *Delaume*, *supra* note 199, at 747.

215. See note 110 *supra*.

216. Article 4 of the Convention provides:

1. Subject to the provisions of Article 5 [relating to employment contracts], a Contracting State cannot claim immunity from the jurisdiction of the courts of another Contracting State if the proceedings relate to an obligation of the State, which, by virtue of a contract, fails to be discharged in the territory of the State of the forum.

2. Paragraph 1 shall not apply:

(a) in the case of a contract concluded between States;

(b) if the parties to the contract have otherwise agreed in writing;

(c) if the State is a party to a contract concluded on its territory and the obligation of the State is governed by its administrative law.

Typically foreign public debt instruments provide for payment of principal and interest upon presentation of coupons or the bond itself to a bank, known as the paying agent, located in the market area in which the bonds are sold. Therefore, the payment obligation falls due within the country where the bonds were sold and may, under the Convention, be enforced there in municipal courts notwithstanding the sovereign charac-

ter of the issuer. It is believed that private loans also generally provide for repayment at the main office of the lender, or the agent of the lenders, so would likewise be judicially enforceable under the Convention. The issue is less pressing for private loans because of the frequency with which they contain waivers of immunity. See text accompanying note 217 *infra*.

217. Delaume, supra note 199, at 748; Note, supra note 112, at 896.

218. Delaume, supra note 199, at 752; see also Report, supra note 4, at 10.

219. Delaume, supra note 199, at 753.

220. E.g., Claim against the Empire of Iran Case, 16 Ent. Bund. 27, 45 I.L.R. 56 (FDR, Fed. Const. Ct. 1963), in 6 Whiteman, supra note 9, at 566-69; 1 Oppenheim, supra note 125, at 274; Lauterpacht, supra note 148, at 237-38. Contra, Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).

221. Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2892, 28 U.S.C. § 1605(a)(3) (1976). This provision by its terms denies immunity from all claims to relief united in a "case" in which one of the claims is to title to particular property. Thus, a corporation bringing suit to establish title to oil expropriated by a foreign state, part of which is present in the United States, may bring an action for title to the oil present in the United States and for a monetary relief equal to the value of the remaining oil. The entire judgment would then be enforceable against the foreign state's commercial assets. See note 143 supra. The claims which could be united in such a "case" are limited only by the rules of joinder.

222. 78 Stat. 1013, 22 U.S.C. § 2370(e)(2) (1964).

223. The "act of state doctrine" recognized in American courts is an outgrowth of principles of the conflicts of law, also known as private international law. Those principles are that the legality of a public act of a foreign state performed within its territory is governed by the law of that state, and that an adjudication of its legality by the foreign state will be given effect. Since commission of the act constitutes an ad hoc determination of its legality according to the laws of the foreign state, it follows that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." Underhill v. Hernandez, 168 U.S. 250, 252, 18 S.Ct. 83, 42 L.Ed. 456 (1897). This rule has been labeled the "act of state doctrine."

In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed. 2d 804 (1964), the Supreme Court ex-

tended the "act of state doctrine" to prevent examination of a nationalization of property alleged to be in violation of international law. The nationalized property was sugar that had belonged to a Cuban corporation owned principally by American investors. After nationalization, the sugar was delivered to an American purchaser by the Cuban state bank. The purchaser, however, delivered payment for the sugar to Sabbatino, the New York receiver for the nationalized corporation's American assets, the latter agreeing to indemnify the purchaser for any loss. The Cuban bank brought suit, alleging diversity jurisdiction, against the purchaser to compel payment and against Sabbatino to enjoin him from making use of the payment made to him. The defendants claimed that the sugar had remained the property of the Cuban corporation, because the nationalization decree was invalid under international law, and that therefore payment had been properly made. The Supreme Court reversed the lower court's decision to the same effect, declaring that American courts could not examine the validity of the nationalization decree because it was an "act of state." In a carefully restricted sentence, the court held

that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

376 U.S. at 428.

Reacting to pressure from American international lawyers and businessmen, Congress quickly limited the effect of Sabbatino by adding Section 620(e)(2), commonly referred to as the Sabbatino Amendment, to the Foreign Assistance Act of 1964, 78 Stat. 1013, 22 U.S.C. § 2370(e)(2) (1964), as amended by the Foreign Assistance Act of 1965, Pub. L. 89-171, 79 Stat. 653. Section 620(e)(2) provides:

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state)

based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection:

Provided: That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law . . . or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

The Amendment has been construed to apply only to cases dealing with rights to property located within the United States previously taken in violation of international law, *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968), and not to affect any foreign state immunity a defendant may claim, *American Hawaiian Ventures, Inc. v. M.V.J. Latuharhary*, 257 F. Supp. 622 (D.N.J. 1966).

A subsequent Supreme Court case added a second exception to the "act of state doctrine" announced in *Sabbatino*. In *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972), the Cuban state bank had sued a New York bank to recover the excess from a sale of collateral held by the New York bank to secure a defaulted loan to the Cuban bank and certain deposits made by nationalized Cuban banks with the New York bank. The New York bank claimed it was entitled to keep the sums in question as a set-off of its claim for Cuba's confiscation of its eleven Cuban branches in violation of international law. The *Sabbatino* Amendment was inapplicable because funds of the nationalized branches were not brought into the United States, but the State Department announced that it had no objection to adjudication of the international law claim underlying the set-off. In these circumstances, the Supreme Court held that the "act of state doctrine" should not prevent an examination of the confiscation. Because of a split among the justices, however, *First National City* is precedent for only a limited exception to the "act of state doctrine": The courts will not apply the doctrine when the executive department has determined that the doctrine should not apply, 406 U.S. 759, 768 (opinion of Rehnquist, J.; Burger, C.J.; and White, J., concurring), the

international law claim is raised as a set-off to an action initiated by the foreign state, 406 U.S. 770, 772-73 (opinion of Douglas, J.), and the court is independently satisfied that "an exercise of jurisdiction would not interfere with delicate foreign relations conducted by the political branches," 406 U.S. 773, 776 (opinion of Powell, J.).

In both Sabbatino and First National City, the international law claims against a foreign state entity were raised as set-offs to an action initiated by the foreign state entity, so sovereign immunity was foreclosed by National City Bank v. Republic of China, 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389 (1955). See text at notes 26-29 supra. In a recent case, the Supreme Court invited reconsideration of Sabbatino, but was unable to assemble a majority of justices to either limit or reaffirm it. Alfred Dunhill of London, Inc. v. The Republic of Cuba, 425 U.S. ____ 96 S.Ct. ____, 48 L.Ed.2d 301 (1976). See text accompanying notes 4a and 4b supra.

224. See text at notes 141-44 supra.

225. Compare The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 354, 5 L.Ed. 454 (1822) (per Story, J.) (property taken by a foreign state in American waters in violation of international law is not immune), with The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812), discussed in text at notes 16-18 supra.

226. See the cases cited in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 440 n.1, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (White, J., dissenting); Restatement (Second) of Foreign Relations Law § 41, Reporters' Note 4; and Domke, "Indonesian Nationalization Measures Before Foreign Courts," 54 Am. J. Int'l L. 305 (1960).

227. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-22, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); 1 Oppenheim, supra note 125, at 267-68; Restatement (Second) § 41, Comment a.

227a. But see Lauterpacht, supra note 148, at 237 (foreign state immune for legislative act, though in violation of international law).

228. The absence of immunity from suits alleging violations of international law could also be analogized to the established proposition that a state may, in imposing sanctions on another state for violation of international law, engage in conduct that would otherwise be proscribed by international law. This basis is too narrow, though, because it cannot support exercises of jurisdiction which exonerate foreign states from the violation claimed or enforcements by third party forum states of international arbitral awards obtained by a foreign citizen against a foreign state for such a violation.

229. Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2893, 28 U.S.C. § 1605(a)(4) (1976).

230. 26 Dept. State Bull. 984 (1952). See Restatement (Second) § 68(b) (1965).

231. But see Republic of Iraq v. First National City Trust Co., 207 F. Supp. 588 (S.D.N.Y. 1962), appeal dismissed, 313 F.2d 194 (2d Cir. 1963) (foreign sovereign suing to succeed to its deceased king's property located in New York is immune from removal of the action to a state court); N.Y. World's Fair 1964-1965 Corp. v. Republic of Guinea, 159 N.Y.L.J. 15, 63 Am. J. Int'l L. 343 (Sup. Ct. 1968) (State Department refusal of immunity from action for rents and damage to property by lessor of pavilion of sovereign on world's fair grounds); Knocklong Corp. v. Kingdom of Afghanistan, 6 Misc. 2d 700, 167 N.Y.S.2d 285 (County Ct. 1957) (State Department allowance of immunity from action to try title to the residence of Afghanistan's chief representative to the United Nations).

232. See the cases cited in Sweeney, supra note 102, at 24-25, and Restatement (Second) § 68, Reporters' Note 1; Limbim Hteik Tin Lat v. Union of Burma, 5 Kakyu. Minji. Saib. 836, 32 I.L.R. 124 (Japan, Dist. Ct. Tokyo 1954); European Convention on State Immunity, art. 9, note 110 supra:

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to:

(a) its rights or interests in, or its use or possession of, immovable property; or

(b) its obligations arising out of its rights or interests in, or use or possession of, immovable property and the property is situated in the territory of the State of the forum.

See also Brownlie, supra note 124, at 284; Sweeney, supra, at 24. Contra, Mahe v. Agent Judiciaire du Tresor Francais, 40 I.L.R. 80 (Madagascar, Ct. App. 1965); Fenwick, supra note 208, at 370.

233. See the cases cited in Sweeney, supra note 102, at 25, and Restatement (Second) § 68, Reporters' Note 2; European Convention on State Immunity, art. 10, note 110 supra:

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a right in movable or immovable property arising by way of succession, gift or bona vacantia.

See also Brownlie, supra note 124, at 284.

234. Art. 22, done April 8, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, in 55 Am. J. Int'l L. 1064 (1961). The Convention is adhered to by 114 states. U.S. Department of State, Treaties in Force 336 (1975). See also Vienna Convention on Consular Relations, art. 31, done Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

235. See, e.g., Caisse Industrielle D'Assurance Mutuelle v. Consul General de la Republique Argentine, 68 R.G.D.I.P. 1011 (1964); 45 I.L.R. 381 (Trib. gr. inst. of Seine 1964).

236. The codification permits execution against or seizure of the property of the central government of a foreign state or of its political subdivisions only if it is used for a commercial activity. Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2896, 28 U.S.C. § 1610(a) and (d) (1976).

237. Id., 28 U.S.C. § 1605(a)(5). State Department comments explaining its addition to an earlier draft of the exceptions dealing with discretionary functions, malicious prosecution, and the like state that the purpose of the revision is to provide for immunity only in those cases in which the United States Government would itself be immune from suit under the Federal Tort Claims Act, 28 U.S.C. § 2680(a) and (h). However, a recent amendment to the Act makes the United States liable for claims arising out of such acts if they are committed by federal investigative or law enforcement officers after March 16, 1974. Pub. L. 93-253 § 2, 88 Stat. 50.

238. See text accompanying notes 99-101 supra.

238a. Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2894, 28 U.S.C. § 1606 (1976).

238b. Id., sec. 2(a), 28 U.S.C. § 1330(a). Actions brought in state courts but removed by the foreign state to federal court will be tried to the court even though there exists a basis for federal jurisdiction other than 28 U.S.C. § 1330. Id., sec. 6, 28 U.S.C. § 1441(d).

239. See Report, supra note 4, at 20-21. The codification permits subsequently obtained judgments to be enforced by garnishing the foreign state's insurer. Foreign Sovereign Immunities Act of 1976, Sec. 4(a), 90 Stat. 2896, 28 U.S.C. § 1610(a)(5) (1976).

240. See Office for Mutual Aid v. Van Antwerpen, [1955-1] Pas. 88, [1954] I.L.R. 121 (Belgium, Sup. Ct. 1954); Societe Anonyme "Eau, Gaz, Electricite et Applications" v. Office for Mutual Aid, [1957-11] Pas. 88, [1956] I.L.R. 205 (Belgium, Ct. App. Brussels 1956); Procureur du Roi v. Toebinte, [1920-11] Pas. 122 (Belgium, Ct. App. Brussels 1920); Greek Government v. Joseph Aboutebout, 39 G.T.M.E. 83 (Egypt, Trib. Alexandria 1948); cf. Papaevangelon v. Gouvernement of the United States (Greece, Ct. of First Inst. Athens 1960), in Sweeney, supra note 102, at 30.

241. See Collision with Foreign Government-Owned Motor Car (Austria) Case, 84 J.B. 43, 40 I.L.R. 73 (Austria, Sup. Ct. 1961) (collision with U.S. Embassy car carrying mail to American Embassy from airport was result of "private" act of driving car, not "public" act of bringing mail to Embassy); Basner v. Andrews, 72 Misc. 2d 228, 339 N.Y.S.2d 67 (City Ct. 1972) (purchase of liability insurance policy constitutes waiver of immunity from suit within coverage).

242. See note 110 supra.

243. Article 11 of the Convention provides:

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

244. Art. 43, done Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261. The Convention is adhered to by sixty-eight states. U.S. Department of State, Treaties in Force 327 (1975).

245. See H. Steiner & D. Vagts, Transnational Legal Problems 383-98 (2d ed. 1976).

246. The purpose of tort law is not only to compensate the victim, but also to prevent future accidents. See generally G. Calabresi, The Costs of Accidents (1970). See also Sucharitkul, supra note 102, at 302.

246a. Leigh, supra note 131, at 281, and his remarks in "New Departures," supra note 13, at 192; Note, "Jurisdictional Immunities of Foreign States," 23 DePaul L. Rev. 1225, 1245 (1974); Note, "International Law--Sovereign Immunity--The Last Straw in Judicial Abdication," 46 Tulane L. Rev. 841, 845 (1972); Comment, "International Law--Sovereign Immunity--The First Decade of the Tate Letter Policy," 60 Mich. L. Rev. 1142, 1144-45 (1962) [hereinafter cited as Comment].

247. The plaintiff in Spacil v. Crowe, 489 F.2d 614, 616 (5th Cir. 1974), received from the Legal Adviser the following explanation of the State Department's decision to recognize a claim of immunity on behalf of Cuba:

The Department's decision to recognize and allow immunity in this case was made on the basis of the most careful consideration of all the circumstances and after appropriate consultation by the Office of

the Legal Adviser with the other interested bureaus and officials in the Department. . . . The Department's decision has been taken, and, it is the Department's view that the public interest and United States foreign relations are best served by the prompt release of the vessel.

In *Rich v. Naviera Vacuba, S.A.*, 197 F. Supp. 710, 714 (E.D. Va.), aff'd, 295 F.2d 24 (4th Cir. 1961), the United States Attorney submitted to the court in his suggestion of immunity the following portion of a letter from the Secretary of State to the Attorney General:

In response to your inquiry to the Department of State concerning the Cuban motor vessel Bahia De Nipe, now at anchor at Norfolk, this is to inform you that it has been determined that the release of this vessel would avoid further disturbance to our international relations in the premises.

248. 318 U.S. 578, 589, 63 S.Ct. 793, 87 L.Ed. 1014 (1943). The Court equated State Department recognition of a claim of immunity to "a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations." *Id.*

249. 489 F.2d 614 (5th Cir. 1974).

250. *Id.* at 619.

251. In *Flota Maritima Browning de Cuba, S.A. v. M.V. Ciudad de la Habana*, 335 F.2d 619, 623 (4th Cir. 1964), the court refused to inquire into the basis of a State Department determination of immunity "because the Executive decision to recognize sovereign immunity in a particular case may depend upon intimate knowledge of matters affecting foreign affairs which are not public information and which are not fit subjects of judicial inquiry." For the same reason, it stated that a sovereign's waiver of immunity would be ineffective in the face of State Department recognition of its claim to immunity. *Id.* at 625. In *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir.), cert. denied, 404 U.S. 985 (1971), the court stated that the State Department should make its determination "in light of the potential consequences to our international position." Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 468, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (White, J., dissenting) (in making a sovereign immunity determination the State Department considers "whether adjudication would 'vex the peace of nations.'").

252. Lowenfeld, *supra* note 3, at 392.

253. 489 F.2d 614 (5th Cir. 1974).

254. In February, 1973, less than a year before attachment of the vessels, the United States and Cuba had entered into an agreement to prosecute hijackers in their own courts or to return them for prosecution. This agreement was a long-term objective of United States foreign policy and the Department presumably did not wish to jeopardize it, especially when the plaintiffs were not American citizens but rather Chilean corporations owned by the Chilean government. It is believed that Cuba exerted strong political pressure to obtain the Imias' release. In addition, Panama delivered notes to the Department protesting attachment of the Imias in the Canal Zone. Leigh, *supra* note 131, at 288-89.

255. 197 F. Supp. 710 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961).

256. Two days before the Bahia de Nipe arrived in Virginia waters, Cuba released a hijacked Eastern Airlines Electra and the United States released Cuban naval vessels brought to Florida by anti-Castro Cubans. In a note exchanged during the negotiations preceding these releases, the Cuban government said

if the Government of the United States guarantees the right of immunity and sovereignty of the boats and airplanes belonging to the Cuban people that are seized in our country and taken to United States territory . . . the Government of Cuba will accord reciprocal treatment to American boats and airplanes that are in a similar situation.

45 Dept. State Bull. 407-08 (1961). The Note delivered by the Cuban Ambassador to Switzerland to the American Ambassador on August 21 to request immunity for the Bahia de Nipe made indirect reference to this exchange. It requested immunity on behalf of Cuba "in consonance with the principles of international law, and in accordance with the reciprocal treatment which it is willing to grant in similar circumstances." 6 Whiteman, *supra* note 9, at 703. The United States Government's memorandum to the Supreme Court in opposition to a stay of the appellate decision in this case revealed that the Department's decision was a political one:

In this case the Secretary of State, in separate letters, has informed the Attorney General that "the release of the vessel would avoid further disturbance of our international relations in the premises," and that "the prompt release of the vessel is necessary to secure the observance

of the rights and obligations of the United States." . . .

These Executive determinations involve delicate and complex policy considerations at a critical time. They were made by the high official responsible for the formation of the Nation's foreign policy and the conduct of foreign relations. Upon their decision the national safety and welfare depend. As Ex parte Peru and Mexico v. Hoffman teach, under our system the courts do not go behind such political determinations when they have been formally made and presented, as in the present case.

* * *

. . . If it were not for the barratry of the master and crew, the vessel would not have come within the American jurisdiction at all; and the status of the vessel is obviously not unrelated to the airplanes illegally taken to Cuba and later returned by that Government.

These were all elements to be considered by the State Department.

1 Int'l Legal Materials 280, 287-89 (1962). For a detailed account of the case's political background, see 1 A. Chayes, T. Ehrlich, & A. Lowenfeld, International Legal Process 87-144 (1968).

257. The State Department's decision to recognize immunity in Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir.), cert. denied, 404 U.S. 985 (1971), is often cited as an example of a politically motivated determination. The decision more probably resulted from a debatable application of the Department's restrictive theory, however. As part of a program to avoid starvation threatened by a drought-created food shortage, the Government of India entered into a charter party with the plaintiff to transport grain to Calcutta. The plaintiff's lighters had to wait off the mouth of the Hooghly River before proceeding to Calcutta because the Indian Government had scheduled too many ships to arrive at the same time. The plaintiff's action in the Southern District of New York alleged three counts: (1) demurrage and (2) unpaid freight under the charter party, and (3) delay and detention, an admiralty action sounding in tort. The charter party had provided that "[a]ny and all disputes arising under this Charter Party are to be determined by the U.S. Courts for the Southern District of New York." The Government of India requested immunity only from the last count, i.e., the noncontractual one. The Department recognized this claim, apparently believing that

the contract waived immunity from contract actions only and that organization of a relief mission is a governmental activity. See Note, 13 *Harv. Int'l L. J.* 527, 528-33 (1972); Recent Decisions, 12 *Va. J. Int'l L.* 140, 140 n.3 (1971).

258. *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 385 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).

259. Compare *Dale Drydock Corp. v. The M/T Mar Caribe*, 199 F. Supp. 871, 874 (S.D. Tex. 1961) (Cuba may not claim sovereign immunity because its diplomatic relations with the United States had been severed), and *The Gul Djemal*, 296 F. 567 (S.D.N.Y. 1922), aff'd, 264 U.S. 90, 44 S.Ct. 244, 68 L.Ed. 574 (1924) (Turkey may not claim immunity because it had severed diplomatic relations with the United States), with *Hungarian People's Republic v. Cecil Associates*, 118 F. Supp. 954, 957 (S.D.N.Y. 1953) (recognition by and diplomatic relations with the United States entitles Hungary to immunity, though the State Department had forced it to close the consulate under litigation because of unfriendly acts), and *Banque de France v. Equitable Trust Co. of N.Y.*, 33 F.2d 202, 207 (S.D.N.Y. 1929) (U.S.S.R. may claim immunity though not recognized by the United States). Cf. *Ex parte Hussein Lutfi Bey*, 256 U.S. 616, 41 S.Ct. 609, 65 L.Ed. 1122 (1921) (leave for appeal denied because whether immunity can be granted to a sovereign which has severed relations with the United States is an open question of uncertain solution).

260. Comment, *supra* note 246a, at 1144.

261. 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943).

262. See note 21 *supra*. See also *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34, 65 S.Ct. 530, 89 L.Ed. 729 (1945) (binding effect given State Department determination of immunity "is founded upon the policy recognized both by the Department of State and the courts that the national interests will best be served when controversies growing out of the judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings.").

263. Comment, "The Fifth Amendment in International Relations: Protection for or from Government Overreaching," 17 *U. Kansas L. Rev.* 91, 93 (1968).

264. *Bilder*, *supra* note 58, at 661-62.

265. *Id.* at 662.

266. *Id.* at 666; Leigh & Atkeson, "Due Process in the Emerging Foreign Relations Law of the United States," 21 *Bus. Lawyer* 853, 870-71, 22 *Bus. Lawyer* 3 (1966) [hereinafter cited as Leigh & Atkeson]; Christenson, "International Claims Procedure Before the Department of State," 13 *Syracuse L. Rev.* 527 (1962) [hereinafter cited as Christenson]. But see note 316 *infra*.

267. Christenson, supra note 266, at 534.

268. Id. at 537; Bilder, supra note 58, at 666; Leigh

& Atkeson, supra note 266, 21 Bus. Lawyer at 870-71.

269. In the settlement of claims it is usually the case that a broad variety of considerations enter into the agreement. There are a variety of concessions the State Department can offer a country seeking to improve its relations with the United States, and it is often true that the settlement received on claims represents the outcome of the bargaining on a variety of issues in which the claims are not of primary interest to the negotiations.

Leigh & Atkeson, supra note 266, 21 Bus. Lawyer at 872.

270. Leigh & Atkeson, supra note 266, 22 Bus. Lawyer at 22.

271. It is well established that the courts will give effect to determinations of Congress, and possibly the executive, within their respective fields of competence, notwithstanding their violation of international law. See note 67 supra. Congress has the authority to extend the jurisdiction of federal district courts over foreign states to the full limit of Art. III cases. U.S. Const., art. III, § 1. The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 146, 3 L.Ed. 287 (1812).

271-1. Thus, the State Department has asserted that execution of state-owned commercial property is prohibited by international law, though state practice and scholarly opinion clearly indicate the contrary. See text accompanying notes 132-34 and 146-61 supra. State Department policy on execution seems to have been motivated by an exaggerated fear of adverse foreign relations consequences. See the remarks of Deputy Legal Adviser Belman in "New Departures," supra note 13, at 186-87.

271a. Lowenfeld, supra note 3, at 423-24.

271a-1. Congress recognized this as a flaw of prior law. Report, supra note 4, at 7.

272. 26 Dept. State Bull. 984 (1952). See text accompanying notes 72-74 supra.

273. A suspicious mind would attribute the Department's failure to publicize detailed standards of decision to an attempt to mask its occasional departure from those standards in cases with unusual political circumstances.

274. A second alternative would have been to direct the courts to apply international law in deciding claims to immunity, but that alternative would not have resulted in the

publication of detailed standards accessible to all necessary to provide for consistent decisions and promote foreseeability.

275. E.g., Remarks of Belman, Leigh & Lillich in "New Departures," supra note 13; Dickinson, "The Law of Nations as National Law: Political Questions," 104 U. Pa. L. Rev. 451 (1956) [hereinafter cited as Dickinson]; Jessup, "Has the Supreme Court Abdicated One of Its Functions?," 40 Am. J. Int'l L. 168 (1946) [hereinafter cited as Jessup]; Leigh, supra note 131; Lillich, "The Proper Role of Domestic Courts in the International Legal Order," 11 Va. J. Int'l L. 9 (1970); Lowenfeld, "Claims," supra note 58; Lowenfeld, supra note 3; Reeves, "The Foreign Sovereign Before United States Courts," 38 Fordham L. Rev. 455 (1970) [hereinafter cited as Reeves, "The Foreign Sovereign"]; Timberg, supra note 14; Note, "Jurisdictional Immunities of Foreign States," supra note 246a; "Proposed Draft Legislation," supra note 13; Note, "International Law--Sovereign Immunity--The Last Straw in Judicial Abdication," supra note 246a; Comment, "Restrictive Sovereign Immunity, the State Department, and the Courts," 62 Nw. U. L. Rev. 397 (1967); Comment, supra note 246a; Note, 13 Harv. Int'l L. J. 527 (1972).

275a. Report, supra note 4, at 7-9; Moore, "The Role of the State Department in Judicial Proceedings," 31 Fordham L. Rev. 277, 281 (1962); "Proposed Draft Legislation," supra note 13, at 325; Note, 13 Harv. Int'l L. J. 527, 535 (1972). See also Jessup, supra note 275, at 170.

275b. Report, supra note 4, at 9.

The history of judicial deference to the Executive and of administrative application of the Tate letter principles reveals extreme unpredictability of result in sovereign immunity cases. Needless to say, one of the purposes of the Tate letter was to produce certainty in the international law of state immunity. In practice almost the opposite has occurred.

Leigh, supra note 131, at 281.

276. "Inevitably, there is pressure on the State Department to determine legal issues on the basis of diplomatic relations and temporal political expediency." Timberg, supra note 14, at 128. See also the remarks of a member of the Office of the Assistant Legal Adviser for Economic Affairs:

Because of the special responsibilities of the government attorney the conflict between his role as advocate for his client and his role as judge as to the legality of his client's proposed actions is typically more acute than is this con-

flit for the private practitioner. Thus, he is frequently faced with difficult questions as to whether he should permit policy considerations to influence his legal opinions on particular questions.

Bilder, supra note 58, at 655 n.42.

278. See Note, 13 Harv. Int'l L. J. 527, 535 (1972).

279. A State Department official has noted that some foreign governments, because they do not comprehend the American system of separation of powers, "tend to view American court action as if it were executive action." Bilder, supra note 58, at 672 n.81. All mature foreign governments should be cognizant of the American structure of government, however, and would be less likely to draw political inferences from judicial than executive action.

280. Report, supra note 4, at 7. Referring to the claim for immunity in Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974) (see pp. 89-90 supra), Monroe Leigh, now the State Department Legal Adviser, speculated as to why the Department granted Cuba immunity:

There is much truth to the contention made by counsel for the Chilean plaintiff that this dispute became political because the Government of Cuba chose to make it political. . . . There is every reason to suppose that the Cuban Government exerted strong political pressure in this case through the Czech Ambassador.

* * *

It seems probable that the Cuban Government took steps to create apprehension as to the continued effectiveness of [a February, 1973, agreement with the United States to prosecute or extradite hijackers] if its demand for immunity should be denied.

Leigh, supra note 131, at 288-89. To this can be contrasted the small number of protests lodged following execution of judgments against the property of foreign sovereigns on the Continent, where the executive plays no part in the grant or denial of immunity. See Sucharitkul, supra note 102, at 262-63; Lauterpacht, supra note 148, at 227, 242.

281. Lowenfeld, supra note 3, at 390. Some commentators have disagreed that American foreign relations would be improved by removing the State Department from the decision-making process. Cardozo, supra note 71, at 473, 498; Recent

Developments, "Doctrines of Sovereign Immunity and Act of State--Conflicting Consequences of State Department Intervention," 25 Vand. L. Rev. 167, 178 (1972). If the State Department had performed its duties following a grant of immunity by espousing the plaintiff's claim, however, serious foreign policy disruptions could have been expected. See Lauterpacht, supra note 148, at 240.

282. In a letter to the Speaker of the House dated January 16, 1973, Secretary of State William P. Rogers and Attorney General Richard G. Kleindienst urged that removal of decision-making power from the State Department by enactment of H.R. 3493 would

free the Department from pressures by foreign states to suggest immunity and from any adverse consequences resulting from the unwillingness of the Department to suggest immunity. The Department would be in a position to assert that the question of immunity is entirely one for the courts.

"Hearing," supra note 4, at 34.

283. Report, supra note 4, at 8; Jessup, supra note 275 at 168, 169; Timberg, supra note 14, at 115-16. Contra, Cardozo, supra note 71, which notes that the Legal Adviser's Office performs similar functions quite often in making international claims settlements.

284. Leigh, supra note 131, at 282; Lowenfeld, supra note 3, at 391; Lowenfeld, "Claims," supra note 58, at 912. Professor Lowenfeld notes that some foreign states refuse to participate in the State Department's hearings, finding them offensive. Id. It is possible that a judicial fact-finding hearing with compulsory process will be even more offensive to foreign sovereigns. See Cardozo, supra note 71, at 474.

285. Timberg, supra note 14, at 115; Note, 13 Harv. Int'l L. J. 527, 535-36 (1967).

286. 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

287. The new legislation may leave room for exercise of the President's inherent foreign policy powers to prevent adjudication of an action against a foreign state or its property in extraordinary circumstances, however. John Boyd, an Attorney-Adviser with the State Department's Office of the Legal Adviser who worked on a draft of the proposed codification, has pointed out that the bill does not prohibit the State Department from making representations to the courts and that, if serious disruption of relations would result from an exercise of jurisdiction, the Department could represent that fact to the courts, who would likely give the representation great

weight or treat it as determinative. Comment, "The Impact of S.566 on the Law of Sovereign Immunity," 6 L. & Policy Int'l Bus. 179, 203 (1974) [hereinafter cited as "Impact"]. But see Statement of Legal Adviser Brower in "Hearing," supra note 4, at 15; Report, supra note 4, at 12.

288. See Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974), discussed in the text at notes 253 and 254 supra.

289. Sec. 4(a), 90 Stat. 2892, 28 U.S.C. § 1605(a)(2) (1976). See text accompanying notes 99-101 supra and note 131 supra.

290. Rather, the prescription comes dangerously close to violating bilateral treaties entered into by the United States which assure to nationals of the other signatories the same access to American courts enjoyed by American nationals. See Reeves, supra note 275, at 487.

291. See note 131 supra.

292. See Reeves, "The Foreign Sovereign," supra note 275, at 487.

293. See text accompanying notes 132-39 supra.

294. See text accompanying notes 141-43 supra.

295. See Report, supra note 4, at 31; "New Departures," supra note 13, at 198.

296. The State Department's comments accompanying an earlier draft of the codification suggest that international traders would benefit from the restriction of execution to commercially related assets because such a policy would prevent retaliation in the form execution against one American corporation's overseas property of a separate but related corporation's obligations. See "Hearing," supra note 4, at 24 and 45. It seems unlikely that the possibility of retaliation, especially in view of the existence of state practice permitting indiscriminate execution against commercial assets, could offset the tangible benefit to international traders of being able to enforce their claims against foreign states. Retaliation would weigh heavy in the balance only if, as has been suggested, the possibility of execution caused foreign states to reduce their investments in the United States to a level which could not satisfy its obligations to American traders. See Lowenfeld, "Claims," supra note 58, at 928-29. In view of American investment opportunities, this seems unlikely.

297. The deposit of American dollars in American banks by foreign banks has been important not only because of its effects on the American balance of payments, see "Hearing," supra note 4, at 46, but also because it can offset disintermediation occurring in periods of high interest rates. See DePamphilis, "The Short-Term Commercial Bank Adjustment Process and Federal Reserve Regulation," N.E. Econ. Rev. (1974) 1, 17-19. It has also been suggested that the commercial or public nature of

money is difficult to determine. Lowenfeld, "Claims," supra note 58, at 909; Collins, "The Effectiveness of the Restrictive Theory of Sovereign Immunity," 4 Colum. J. Transnat'l L. 119, 150 (1965) [hereinafter cited as Collins].

298. Note, supra note 112, at 890. To be sure, there are practical forces which compel a state to honor its obligations voluntarily. A state which makes a practice of dishonoring judgments returned against itself will find that private parties are less eager to deal with it at reasonable prices in future transactions. Moreover, most states will voluntarily satisfy their judgments in order to avoid diplomatic pressure and moral stigma. Some commentators have suggested that these forces make execution unnecessary. Comment, "Sovereign Immunity from Judicial Enforcement: The Impact of the European Convention on State Immunity," 12 Colum. J. Transmat'l L. 130, 149 (1973); Comment, supra note 246a, at 1151. Deputy Legal Adviser Belman, in "New Departures," supra note 13, at 186-87, has observed that "[i]n practice, . . . the immunity from execution we now accord foreign sovereigns has not resulted in their refusing to pay judgments against them." However, though a study made in 1960 could find few cases in which judicial decisions and arbitral awards against foreign states went unsatisfied, see Schachter, "The Enforcement of International Judicial and Arbitral Decisions," 54 Am. J. Int'l L. 1 (1960), "the situation is now such that obligation avoidance by states has generated no small amount of litigation." Comment, "Sovereign Immunity from Judicial Enforcement: The Impact of the European Convention on State Immunity," supra, at 131. It is reported that the judgment against Sweden whose execution Sweden successfully avoided in Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930), cert. denied, 282 U.S. 896 (1931), the case that firmly established execution immunity in the United States, was settled three years later for one-third the amount of the judgment. Collins, supra note 297, at 136. Thus, it is likely that some avoidance of foreign states' international obligations will result from their immunity from execution.

299. Leigh, supra note 131, at 285; Schmitthoff, supra note 117, at 453.

300. E.g., Collins, supra note 297, at 149; Leigh and Lillich in "New Departures," supra note 13, at 190-192 and 195; Reeves, "The Foreign Sovereign," supra note 275, at 496; Reeves, supra note 158, at 522-23; Comment, "Sovereign Immunity from Judicial Enforcement: The Impact of the European Convention on State Immunity," supra note 298, at 154; Comment, "Sovereign Immunity vs. Execution of Judgment: A Need to Reappraise Our National Policy," 13 B.C. Ind. & Com. L. Rev. 369, 381-82

(1971); Note, supra note 112, at 918; Comment, supra note 246a, at 1152. Contra, Belman in "New Departures," supra, at 186; "Impact," supra note 287, at 204.

301. See text at notes 162-69 supra.

302. Lowenfeld, supra note 3, at 429; Belman in "New Departures," supra note 13, at 184, 186.

303. See text accompanying notes 172-79 supra.

304. See the State Department's comments accompanying an earlier draft of the codification in "Hearing," supra note 4, at 39.

305. See text accompanying notes 190-204 supra.

307. See text accompanying notes 208a-11 supra.

308. State Department "Section-by-Section Analysis," in "Hearing," supra note 4, at 42.

309. Statement of Legal Adviser Brower, in id., at 22. One commentator, an attorney with the International Bank for Reconstruction and Development, has doubted that the American capital market would be injured by a withdrawal of immunity in cases dealing with public debt, citing the Swiss experience and the willingness of most sovereigns to waive their immunity. Delaume, supra note 199. But cf. Reeves, "The Foreign Sovereign," supra note 275, at 491.

310. See text accompanying notes 221-25 supra.

311. See note 223 and text accompanying notes 4a and 4b supra.

312. See text accompanying notes 246a-57 supra.

313. Contra, Lowenfeld, "Claims," supra note 58, at 919-21.

314. E.g., T. Giuttari, The American Law of Sovereign Immunity 365 (1970) [hereinafter cited as Giuttari]; Goodman, "Immunity of Foreign Sovereigns: A Political or Legal Question--Victory Transport Revisited," 38 Brooklyn L. Rev. 885, 906 (1972); Moore, supra note 275a, at 300-01; Note, The Statutory Proposal to Regulate the Jurisdictional Immunities of Foreign States, supra note 71, at 587-92; Note, "Is the Current Disposition of the Doctrine of Sovereign Immunity in the United States Appropriate in Light of Prevailing Governmental Policy?," 1 Ga. J. Int'l & Comp. L. 133, 178 (1970); Comment, "Restrictive Sovereign Immunity, the State Department, and the Courts," supra note 275, at 424; Comment, "Judicial Adoption of Restrictive Immunity for Foreign Sovereigns," 51 Va. L. Rev. 316, 362 (1965); Comment, supra note 246a, at 1152. One scholar would not have made the Department's politically influenced suggestion determinative, but only persuasive. Dickinson, supra note 275, at 479. Two commentators would have to continue the Department's broad authority to determine immunity claims in both political and nonpolitical contexts. Cardozo, supra note 71, at 473 and 498, and his remarks in

"New Departures," supra note 13, at 193-94; Franck, "The Courts, the State Department and National Policy: A Criterion for Judicial Abdication," 44 Minn. L. Rev. 1101, 1117 (1960).

315. E.g., Giuttari, supra note 314, at 365; Leigh & Atkeson, supra note 266, at 22 and 26; Recent Developments, supra note 281, at 178-79; Comment, The Fifth Amendment in International Relations: Protection for or from Government Overreaching, supra note 263, at 103; Note, supra note 112, at 917.

316. The only court ruling directly on the question has held that dismissal of an attachment on the basis of State Department recognition of the property's immunity for political reasons is not a taking of property without compensation or a deprivation of property without due process within the Fifth Amendment. Rich v. Naviera Vacuba, S.A., 295 F.2d 24, 26 (4th Cir. 1961). However, there is some authority in the Court of Claims to the effect that negligent or willful failure by the State Department to espouse a valid international claim of a U.S. citizen against a foreign sovereign or the government's release of that claim gives rise to a right to compensation under the Fifth Amendment. See The Brigs "Fanny" and "Hope," 46 Ct. Cl. 214 (1911) (dictum); Gray v. United States, 21 Ct. Cl. 340 (1886); Meade v. United States, 2 Ct. Cl. 224, aff'd, 76 U.S. (9 Wall.) 691 (1869); Owners of the Brig Armstrong v. United States, digested in J. Devereaux, Court of Claims 38-41 (1856).

